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No. 93-

In the Supreme Court of the United States

OCTOBER TERM, 1993

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

SARAH KATTAN, BY HER PARENTS AND NEXT FRIENDS,
SUSAN J. THOMAS AND JOSEPH KATTAN, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Whether a litigant in federal district court who does not initially advance an argument that is foreclosed by the law of the Circuit is precluded from making that argument when this Court subsequently issues a decision overturning the Circuit precedent.

PARTIES

Petitioners are the District of Columbia and several of its officials all of whom were sued in their official capacity: Dr. Franklin L. Smith, Superintendent, District of Columbia Public Schools ("DCPS"); Dr. B. Garnett Pinkney, Assistant Superintendent — Special Education, DCPS; and Dr. Constance Clark, Associate Superintendent, DCPS, as successor in interest to Dr. Doris Woodson. Respondents, who were plaintiffs below, are Sarah Kattan and her parents, Joseph Kattan and Susan J. Thomas.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

The District of Columbia and several of its officials petition this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The June 15, 1993, decision of the United States Court of Appeals for the District of Columbia Circuit (App. 13a-25a) is not reported. The D.C. Circuit's June 30, 1993, decision, which amended its June 15 decision, is reported at 995 F.2d 274. App. 1a-12a. The December 11, 1991, decision of the United States District Court for the District of Columbia (App. 33a-35a) is not reported.

The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. On July 7, 1993, petitioners filed a timely petition for rehearing and a suggestion for rehearing *en banc*. The petition and suggestion were denied on October 6, 1993. App. 37a, 38a.

On November 22, petitioners filed an application for an extension of time in which to file their petition for a writ

of certiorari. On November 23, the Chief Justice extended the time for filing the petition to February 8, 1994. App. 39a. On January 21, petitioners filed a supplemental application for an extension of time. On January 24, the Chief Justice extended the time for filing the petition to February 10.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND COURT RULES INVOLVED

This case involves the following statutory provisions and court rules:

Fed. R. Civ. P. 59(e): "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

20 U.S.C. § 1415(e)(4)(B): "In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents . . . of a handicapped child or youth who is the prevailing party."

28 U.S.C. § 2106: "The Supreme Court or any other court of appellate jurisdiction may . . . reverse any judgment . . . of a court lawfully brought before it for review . . . as may be just under the circumstances."

STATEMENT OF THE CASE

The D.C. Circuit has held that the District of Columbia may not invoke this Court's decision in *Kay v. Ehrler*, 111 S. Ct. 1435 (1991), barring fee awards to *pro se* attorneys under federal fee-shifting statutes, because it did not dispute the then-controlling Circuit precedent, permitting such fee awards, in its initial opposition to a fee application in 1988. This Court should reverse that decision because it conflicts with the decisions of this Court, is fundamentally unfair, and undermines the efficient administration of justice.

I. BACKGROUND.

This suit was brought pursuant to the Individuals with Disabilities Education Act ("IDEA")[1] on behalf of Sarah Kattan, a handicapped child, by her parents, on March 9, 1988, against the District of Columbia seeking an order requiring payment of her private school tuition. Sarah and her parents were initially represented by her father, an attorney. At the urging of the trial court, the Honorable Joyce Hens Green, he secured co-counsel and the Kattans prevailed on the merits on August 9, 1988.

On October 11, 1988, Mr. Kattan and his co-counsel submitted an application for attorney's fees pursuant to 20 U.S.C. § 1415(e)(4)(B).[2] In that application, they cited *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977), as establishing as the law of the D.C. Circuit the rule that *pro se* attorneys may recover fees under federal fee-shifting statutes. In *Cuneo*, the D.C. Circuit, relying on a Fifth Circuit civil rights case, ruled that attorneys proceeding *pro se* could recover fees under the Freedom of Information Act ("FOIA"). Given *Cuneo* and this Court's repeated admonition that similar language in federal fee-shifting provisions should be construed in the same fashion, the District did not dispute that *Cuneo* was controlling and the propriety of the fees sought was otherwise briefed in October and November, 1988.

Nearly three years later, on October 17, 1991, Judge Green entered an order awarding attorney's fees, including fees to Mr. Kattan for his work. On October 31, the District filed a timely motion, pursuant to Fed. R. Civ. P. 59(e), to alter or amend the judgment. In this motion, the District cited this Court's April, 1991, decision in *Kay v. Ehrler* that fees

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[1] 84 Stat. 175, as amended, 20 U.S.C. § 1400 *et seq.* (1988 ed. and Supp. IV). The IDEA was formerly named the Education of the Handicapped Act ("EHA") and the Handicapped Children's Protection Act ("HCPA").

[2] It provides: "In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents . . . of a handicapped child or youth who is the prevailing party."

may not be awarded under 42 U.S.C. § 1988 to attorneys who represent themselves. The District urged that *Kay v. Ehrler* barred any fee award under the IDEA to Mr. Kattan for his own legal work.

II. THE TRIAL COURT'S DECISION.

Judge Green initially purported to deny the District's motion on the ground that it had waived the issue three years earlier in 1988 when it responded to the fee application. Furthermore, Judge Green, without even referring to the D.C. Circuit's decision in *Cuneo*, also rejected the District's argument that its "Rule 59 motion is based on a change of law not reasonably anticipated . . .. App. 34a n.1. In Judge Green's view, because a federal district court judge in the District of Columbia had ruled in 1984 that *pro se* attorneys may not recover fees under 42 U.S.C. § 1988, the District should have anticipated in 1988 this Court's 1991 decision in *Kay v. Ehrler* and thus should have raised the issue in opposing the fee application at the outset. App. 34a n.1, citing *Lawrence v. Staats*, 586 F. Supp. 1375, 1378-80 (D.D.C. 1984).[3]

Judge Green nevertheless reached the merits, and she ruled that the District's interpretation of *Kay v. Ehrler* was wrong:

> . . . [P]laintiffs' motion for fees is based on the EHA, a different statutory scheme from that which formed the basis of the *Kay v. Ehrler* decision. And defendants have not cited any legislative history or caselaw that supports defendants' argument to extend the ambit of *Kay v. Ehrler* to EHA cases. Consequently, defendants' motion to alter or amend the judgment must be denied.

App. 34a.

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[3] This decision was appealed in 1984 by the unsuccessful *pro se* attorney, and, after pending in the court of appeals for nearly seven years, it was affirmed following *Kay v. Ehrler*. *Lawrence v. Bowsher*, 931 F.2d 1579 (D.C. Cir. 1991).

III. PROCEEDINGS IN THE DISTRICT OF COLUMBIA CIRCUIT.

A. Its June 15 Decision.

On June 15, 1993, a divided panel of the D.C. Circuit affirmed. The majority (Mikva, C.J., & Sentelle, J.) never reached the merits. Instead, it ruled *sua sponte* that the District's Rule 59(e) motion had been filed out of time and, as a consequence, held that Judge Green "should not have reached the merits of the . . . motion." App. 17a. According to the majority, Rule 59(e) motions must be filed within ten calendar days after entry of the judgment, and the District's motion was tardy because it was filed on October 31, 14 days after entry of the judgment on October 17. As a result, the majority treated the fee issue as if it had been raised for the first time on appeal and analyzed the propriety of deciding it under 28 U.S.C. § 2106.[4] In its view, the cases allowing review under section 2106 were distinguishable because, in those cases, "the intervening decision enunciated a new legal principle that was previously unavailable . . . for all practical purposes." App. 18a. According to the majority, the District should have urged in 1988 that *Cuneo*, a FOIA case, was distinguishable. Thus, overlooking *Cuneo's* reliance on a civil rights case permitting fee awards to *pro se* attorneys and this Court's command that similar language in federal fee-shifting statutes should be consistently interpreted, the majority stated that, because *Cuneo* relied on the policies underlying FOIA, the District had "*no basis* to believe that *Cuneo* settled the HCPA question." App. 19a (emphasis added). In its view, "[s]uch an argument would have been far from frivolous" because, in distinguishing

[4] 28 U.S.C. § 2106 provides: "The Supreme Court or any other court of appellate jurisdiction may . . . reverse any judgment . . . of a court lawfully brought before it for review . . . *as may be just under the circumstances.*" (Emphasis added). In its briefs before the panel, the District had cited cases interpreting this provision in support of its argument that it could bring before the trial court in a Rule 59(e) motion the change of law wrought by this Court in *Kay v. Ehrler*. The District had urged that any legal issue that may be raised for the first time on appeal necessarily may be raised for the first time before appeal in a Rule 59(e) motion.

Cuneo, "the District could [have] look[ed] to [the district court's 1984 decision in] *Lawrence*," which found policy differences between FOIA and section 1988.[5] *Id.* The majority held: "Because the District of Columbia did not contest Mr. Kattan's entitlement to attorney's fees *in its original opposition* to the Kattans' application for fees, we find that the District waived the issue and *cannot raise it for the first time on appeal.*" App. 23a (emphasis added).

Judge Douglas H. Ginsburg dissented. In his view, Judge Green's distinction between section 1988 and the IDEA fee provision "is the proverbial distinction without a difference." App. 24a. Thus, given this Court's repeated admonitions that similar language in fee-shifting provisions should be consistently construed and this Court's decision in *Kay v. Ehrler*, Judge Green's "grant of a fee for the work performed by Mr. Kattan was clearly an error." *Id.*

Judge Ginsburg also rejected the majority's waiver analysis:

> The District of Columbia had no reason in 1988 to anticipate that the Supreme Court would in 1991 change the law of this circuit, which then authorized the district court to award an attorney's fee to a *pro se* litigant. On the contrary, the district court was clearly bound both by *Cuneo* . . . and by the Supreme Court's longstanding command that similarly-worded fee-shifting provisions are to be treated alike. The distinction the district court drew in *Lawrence* . . . ran contrary to the Supreme Court's approach. *See Lawrence v. Bowsher*, 931 F.2d 1579, 1580 (D.C. Cir. 1991) (affirming "[s]olely" on the basis of intervening Supreme Court decision in *Kay v. Ehrler*, which overruled *Cuneo*). *But see* Ct. Op. at 7 [App. 19a] (lauding the district court for "a well-reasoned opinion" in *Lawrence* . . .).

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[5] Finding the district court's decision in *Lawrence* in 1988 was not easy, however, because that decision never cited *Cuneo*. Thus, had a litigant "shepardized" *Cuneo*, it would not have found the district court's decision in *Lawrence*.

> It is simply unreasonable to penalize the District . . . for failing to have argued a distinction (between the fee provision of the FOIA and that of the HCPA) that the district court would have been required to reject under Supreme Court and circuit precedent. By holding that the District waived the issue of Mr. Kattan's eligibility for fees, the court is in effect punishing a litigant for not making what would have been at the time an almost frivolous argument.

App. 25a

B. Rehearing.

On July 7, the District of Columbia filed a timely petition for rehearing and rehearing *en banc*. The District sought review of the panel majority's rulings (1) that its Rule 59(e) motion had been filed out of time and thus that Judge Green had erred in reaching the merits of the motion and (2) that the District could not invoke this Court's 1991 decision in *Kay v. Ehrler* because it failed in 1988 to attempt to distinguish the D.C. Circuit's contrary 1977 decision in *Cuneo*.

On the first point, the District urged that the majority had overlooked a critical provision of Fed. R. Civ. P. 6(a), which provides that intermediate Saturdays, Sundays, and legal holidays are to be excluded in computing time periods of fewer than 11 days. When Rule 6(a) is considered, the District's Rule 59(e) motion was timely, because excluding weekends, it was filed and served on the tenth day after entry of the judgment. As a consequence, the majority had erred in ruling *sua sponte* that it was not timely and thus that Judge Green should not have reached the merits.

The District also sought rehearing of the majority's waiver ruling. It urged, *inter alia*, that, in 1988, the D.C. Circuit's 1977 ruling in *Cuneo* was controlling and that it could not reasonably have anticipated that this Court would issue a contrary decision in 1991. The District also urged that the majority's decision to raise *sua sponte* the timeliness of its

Rule 59(e) motion seriously conflicted with the majority's ruling that the fee issue was not cognizable on appeal.

Both the petition for rehearing and the suggestion for rehearing *en banc* were denied on October 6, 1993. Judge Ginsburg would have granted the petition and Judge Stephen F. Williams, the suggestion. App. 37a & 38a.

C. Events Following Denial Of Rehearing.

Following denial of rehearing, the District decided to seek review in this Court. On November 18, however, it discovered that there was a significant disparity between the decision the D.C. Circuit had transmitted to it and for which it had sought rehearing and the decision reported at 995 F.2d 274. The reported decision, moreover, contained the notation "As amended June 30, 1993." App. 1a. It differed from the decision issued on June 15 in two principal respects: (1) it does not contain the holding that the District's Rule 59(e) motion was untimely (*compare* App. 4a *with* App. 17a) and thus that Judge Green had wrongfully reached the merits; and (2) it contains a new discussion of Rule 59(e) (*compare* App. 4a-5a *with* App. 17a), as follows:

> Ordinarily Rule 59 motions for either a new trial or a rehearing are not granted by the District Court where they are used by a losing party to request the trial judge to reopen proceedings in order to consider a new defensive theory which could have been raised during the original proceedings.
>
> *Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 482 F.2d 710, 711 (D.C. Cir. 1973), *overruled on different grounds*, 421 U.S. 168, 95 S. Ct. 1491, 44 L.Ed.2d 57 (1975). *See also Fed. Deposit Ins. Corp. v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986) (Rule 59(e) motion "cannot be used to raise arguments which could, and should, have been made before the judgment issued.").

App. 5a.

The District had never received any amended decision and it had never been notified that any amendment had been

made. Nor had the Kattans. Furthermore, the Clerk's Office for the D.C. Circuit could not locate any amended decision and the docket maintained by that Office pursuant to F.R.A.P. 36 & 45(b), (c) & (d) did not contain any indication that the June 15 decision had been amended. See App. 42a.

On November 22, the District, citing these surprising developments, filed a motion to clarify and vacate in the D.C. Circuit and an application for an extension of time in this Court for filing their petition for a writ of certiorari. The motion to clarify and vacate argued that, if the decision of the panel had been amended, the D.C. Circuit should vacate its order entering judgment in the appeal for the reasons stated in the June 15 decision and enter a new judgment so that the District could seek full and fair rehearing in the Circuit.[6]

On November 23, the Chief Justice granted the District's application for an extension of time. App. 39a. Over two weeks later, on December 9, the original three-judge panel issued an order "on the court's own motion, that the District of Columbia submit a supplemental memorandum of no more than five pages setting forth any argument that it was unable to make in its petition for rehearing/suggestion for rehearing *en banc* because it did not receive the court's June 30, 1993, order." App. 40a. The District was given a week, until December 16, to comply. App. 40a.

The District filed a supplemental memorandum on December 14. One week later, on December 21, the panel issued an order denying the motion. App. 41a.

The District then proceeded with this petition in the belief that the panel, in its orders of December 9 and 21, had given sufficient indication that the majority's June 15 decision had

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[6] Assuming that the June 15 decision had been amended and that the full court had been provided with the amended decision, the District's rehearing petition likely would have been viewed with disfavor because it addressed an issue that was not in the case and failed to address an issue that was in the case.

been amended even though no amended decision had been docketed in the D.C. Circuit or served on the parties. App. 42a-43a.

REASONS FOR GRANTING THE WRIT

A divided panel of the D.C. Circuit has wrongly imposed on litigants in federal district courts a requirement that they dispute adverse controlling Circuit precedent in order to invoke a supervening change of law by this Court in their favor. As a consequence, the court wrongly refused to decide whether *Kay v. Ehrler*, which bars fees to *pro se* attorneys under 42 U.S.C. § 1988, also bars fees to *pro se* attorneys under the indistinguishable fee provision of IDEA.

The decision of the D.C. Circuit is in conflict with the decisions of this Court. This Court's decisions impose obligations on federal courts to ascertain what the law is and to apply it correctly. These decisions also allow litigants more leeway to invoke a supervening change of law in their favor and do not require them to challenge a binding adverse precedent as a condition of doing so. The decision of the D.C. Circuit is also in conflict with the decisions of other Circuits.

The D.C. Circuit's rule is bad policy. It forces trial counsel to make arguments that reasonably appear to be foreclosed by Circuit precedent and will thus require district court judges to squander their scarce resources deciding such arguments. Furthermore, the D.C. Circuit's rule will result in the proliferation of motions for sanctions and in an increase in the number of orders imposing sanctions. Because the D.C. Circuit's rule requires counsel to attempt to distinguish controlling adverse Circuit precedent in order to invoke a subsequent change of law by this Court in favor of their client, they necessarily must make arguments that will precipitate motions for sanctions and that will be viewed by busy federal district court judges as frivolous.

This case is similar to, but far more important than, *Elder v. Holloway*, No. 92-8579 (argued January 10, 1994). In both cases, the overriding issue is whether a federal appellate court is obligated to decide cases properly before it in accordance

with the law or whether it may allow a judgment of a federal district court to stand which it knows to be wrong. In *Elder*, the Ninth Circuit affirmed a judgment of a federal district court even though the judgment conflicted with one of its own decisions governing the constitutionality of arrests made without a warrant. In this case, the D.C. Circuit affirmed a judgment awarding attorney's fees even though the judgment conflicted with a decision of this Court. The decisions of both the Ninth and the D.C. Circuits are a serious departure from the fundamental principles of judicial decision-making announced by this Court.

This case is far more important than *Elder* for several reasons. First, the decision here necessarily affects a far greater number of cases than the Ninth Circuit's decision in *Elder*. In *Elder*, the problem arose because trial counsel failed to cite (and the district court judge apparently did not find) a controlling Circuit precedent in his client's favor. Here, the problem arose because trial counsel for the District of Columbia failed to dispute the applicability of an adverse Circuit precedent that counsel for both parties (and apparently the district court) reasonably believed to be controlling. Thus, while *Elder* involves a fairly unusual problem — trial counsel's failure to cite an extant controlling Circuit precedent in his client's favor — this case involves a problem that arises whenever a federal appellate court adopts, as the law of the Circuit, a legal rule with which this Court subsequently disagrees. This problem necessarily arises whenever this Court, as it frequently does, resolves a conflict among the Circuits.

Second, the decision here is far more unfair to litigants. It is one thing to punish a litigant because his counsel at the district court level failed to cite a controlling Circuit precedent in his favor. It is quite another thing to punish a litigant because his counsel at the district court level failed to attempt to distinguish controlling, adverse Circuit precedent and sought to litigate an issue only after this Court issued a contrary, favorable ruling. In the latter set of circumstances, a litigant is punished not for any carelessness on the part of his counsel but because a federal appeals court

misapprehended the very law it is charged with construing correctly.

The decision here is more unfair than *Elder* for yet another reason. There are no disincentives for trial counsel to cite a controlling Circuit precedent in their client's favor. By contrast, trial counsel who attempt to distinguish adverse controlling Circuit precedent run the risk of having a Rule 11 motion (Fed. R. Civ. P. 11) filed against them and the risk of having sanctions imposed by busy trial court judges.

Finally, the decision here has far graver consequences than *Elder* for the efficient and fair operation of the federal courts. The Ninth Circuit's *Elder* rule is likely to provide even one more, and ordinarily superfluous, incentive for trial counsel to identify controlling Circuit precedent in their client's favor. This additional incentive can only ease the burdens of federal district court judges. By contrast, the D.C. Circuit's rule will require tenuous, even untenable, motions to be filed and decided, and will precipitate collateral motions for sanctions and decisions on those motions.

ARGUMENT

I. THE D.C. CIRCUIT'S DECISION VIOLATES THE PRINCIPLE THAT FEDERAL COURTS HAVE AN OBLIGATION TO DECIDE CASES LAWFULLY BEFORE THEM IN ACCORDANCE WITH THE LAW.

A. This Court Repeatedly Has Ruled That Federal Courts Must Decide Cases In Accordance With The Law.

This Court has long held that federal courts have the responsibility to ascertain what the law is and to apply it correctly in resolving disputes properly before them. As this Court has stated, because "judgments are precedents," the obligation to decide cases in accordance with the law "cannot be left merely to the stipulation of the parties," but rests squarely on the courts. *Young v. United States*, 315 U.S. 257, 259 (1942). *See also, e.g., Lear, Inc. v. Adkins*, 395 U.S. 653, 662 n.10 (1969); *Orloff v. Willoughby*, 345 U.S. 83, 87-88 (1953); *Town of South Ottawa v. Perkins*, 94 U.S. 260, 267 (1877).

Thus, for example, in *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73 (1990), this Court *sua sponte* construed a federal statute to dispose of the case on a ground neither decided by the court below nor argued in this Court. This Court construed the statute *sua sponte* because, "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Financial Services, Inc.*, 111 S. Ct. 1711, 1718 (1991). Similarly, in *United States Nat'l Bank of Oregon v. Independent Ins. Agents*, 113 S. Ct. 2173 (1993), this Court ruled that the D.C. Circuit acted properly when it decided whether the federal statute governing the case was valid although the validity of the statute had not been raised in the district court or even in the briefs and oral argument on appeal.

This Court has also ruled that Fed. R. Civ. P. 59(e) is a proper vehicle for raising similar legal issues for the first time at the trial level. Thus, in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), this Court ruled that a federal district court acted properly in entertaining a post-trial motion challenging jury instructions even though the movant had earlier failed to object to these instructions in violation of the "uncompromising" directive of Fed. R. Civ. P. 51. *Id.* at 255. And in *Leary v. United States*, 395 U.S. 6 (1969), this Court ruled that a criminal defendant could raise for the first time in a post-trial motion the issue whether the privilege against self-incrimination was a defense to his prosecution. Because at the time of trial, the law of the governing Circuit prohibited invocation of the privilege in the circumstances of defendant's case and this Court had not yet issued its contrary ruling, "his failure to raise the issue at that time did not amount to a waiver . . .." *Id.* at 27-28.

The D.C. Circuit's rulings here — that the District waived the argument that the IDEA does not permit a *pro se* attorney to recover fees; that the District could not invoke this Court's supervening favorable decision in a Rule 59(e) motion; and that Judge Green somehow acted improperly

in deciding the District's motion on the merits — conflict with the decisions of this Court. Thus, this Court's decision in *Arcadia, Ohio* to construe *sua sponte* the federal statute governing the case surely permitted Judge Green to reach the merits of the District's argument that the federal fee-shifting statute at issue here does not permit an award of fees to *pro se* attorneys. Similarly, if, as this Court ruled in *Fact Concerts*, a federal district court acts properly in deciding the merits of a post-trial motion challenging jury instructions, surely Judge Green acted properly in deciding the merits of the District's post-judgment motion addressed to the issue whether Congress has authorized fees to *pro se* attorneys. Finally, if, as this Court ruled in *Leary*, a defendant may raise for the first time in a post-trial motion a decision of this Court overturning adverse Circuit precedent, then surely the District was permitted to invoke *Kay v. Ehrler* in a Rule 59(e) motion.

Had the panel majority reached the merits, it would have been compelled to rule that *Kay v. Ehrler* bars a fee award to IDEA *pro se* litigants. First, in *Kay v. Ehrler*, this Court ruled that "an attorney who represents himself in a successful civil rights action may" not "be awarded a reasonable attorney's fee . . ., under 42 U.S.C. § 1988." 111 S. Ct. at 1435-36. According to this Court, "the word 'attorney' assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under § 1988." *Id.* at 1437 (footnotes omitted). Second, this Court repeatedly has ruled that similar language in federal fee-shifting provisions should be interpreted in the same way. *See, e.g., City of Burlington v. Dague*, 112 S. Ct. 2638, 2641 (1992); *Independent Federation of Flight Attendents v. Zipes*, 491 U.S. 754, 758 n.2 (1989) (§ 1988 and fee provision of Title VII should be "interpreted alike"); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560 (1986) (fee provision of Clean Air Act should be interpreted like § 1988).

As even the panel majority acknowledged, the language of IDEA's fee-shifting provision is identical in all relevant

respects to section 1988. See App. 3a. Accordingly, *Kay v. Ehrler* bars a fee award to IDEA *pro se* litigants.

B. The Legal Issue Here Properly Could Have Been Raised For The First Time On Appeal.

The panel majority correctly acknowledged that appellate courts have the power " 'not only to correct error in the judgment under review but to make such disposition of [a] . . . case as justice requires' " and that, " 'in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered.' " App. 7a, quoting *Patterson v. Alabama*, 294 U.S. 600, 607 (1935). *See also supra* at 5 n.4. However, according to the majority, before an issue may be raised for the first time on appeal based on a change of law, there must be "exceptional circumstances" and/or "the intervening decision [must] enunciate[] a new legal principle that was previously unavailable . . . for all practical purposes." App. 8a, 7a.

This is not a correct statement of the law, as even the decisions of this Court cited by the panel majority make clear. Thus, in *Hormel v. Helvering*, 312 U.S. 552 (1941), this Court, citing the need to protect the public fisc, permitted the government to raise a new legal issue on appeal even though it had not been foreclosed from making the argument earlier. This Court stated that an appellate court should review an issue raised for the first time on appeal when, for example, "there have been judicial interpretations of existing law after decision below and pending appeal — interpretations which if applied might have materially altered the result." *Id.* at 558-59. It explained:

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

Id. at 557. As this Court also explained, the general rule that a federal appeals court does not consider issues not raised below is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Id.* at 556. *Accord Singleton v. Wulff*, 428 U.S. 106, 120 (1976).[7]

This Court has not, therefore, announced any "exceptional circumstances" test for determining whether a party may raise an issue for the first time on appeal. Nor has this Court ruled that, before an issue may be raised for the first time on appeal based on a change of law, the new decision must announce a legal principle that was previously unavailable for all practical purposes. Instead, this Court has weighed heavily the fundamental principle that disputes should be resolved in accordance with the law; has made clear that rules of procedure are not ends in themselves; and has inquired whether permitting a litigant to raise an issue for the first time on appeal would unfairly prejudice the other parties to the dispute by denying them the opportunity to introduce evidence relevant to the issue.

In this case, the panel majority never made any inquiry into whether it would be fair to permit the District to invoke this Court's decision in *Kay v. Ehrler*. Instead, it proceeded to apply woodenly a general rule that issues may not be raised for the first time on appeal, even though the District, in fact, raised the issue below, even though the trial court decided the issue and plainly misconstrued the law, and even though the reason for that rule does not apply here.

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[7] The panel majority cited two other decisions of this Court, *Leary v. United States*, *supra*, and *Patterson v. Alabama*, *supra*. As we have already explained, however, *Leary* would permit review here and thus provides no support for the D.C. Circuit's ruling. *See supra* at 13 & 14. Nor does *Patterson*. In *Patterson*, this Court remanded a criminal case to a state supreme court to permit it to re-examine its ruling that the defendant's procedural error under state law precluded him from raising a federal constitutional claim that this Court had resolved favorably to another person convicted of the same crime in a separate case.

II. THE D.C. CIRCUIT'S WAIVER RULING IS IN CONFLICT WITH THE RULINGS OF OTHER CIRCUITS.

The D.C. Circuit's waiver ruling is in conflict with the decisions of other Circuits. *See, e.g., Morris v. American National Can Corp.*, 988 F.2d 50 (8th Cir. 1993); *Weaver v. Bowers*, 657 F.2d 1356 (3rd Cir. 1981) (*en banc*), *cert. denied*, 455 U.S. 942 (1982).

In *Morris*, the Eighth Circuit ruled that a defendant in a civil rights case could invoke *City of Burlington v. Dague*, *supra*, in which this Court ruled that a lodestar fee award under the typical federal fee-shifting statute can never be enhanced to compensate for risk, even though the defendant had not raised that issue either in the district court or in the first appeal in the case. Indeed, in the first appeal, an appeal by the plaintiff who had been denied risk enhancement, the defendant had urged that Justice O'Connor's opinion in *Delaware Valley II* (*Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987)), was controlling, and the Eighth Circuit, which already had adopted her opinion as the law of the Circuit, had reversed and remanded the case. The district court then entered a risk enhancement of 50 percent, and 19 days later, this Court issued its decision in *Dague*. In ruling that the defendant could invoke *Dague*, the Eighth Circuit declined to find that the defendant had waived this argument by not raising it either at the trial level in the first instance or in the first appeal.

Similarly, in *Weaver*, the Third Circuit permitted defendants to litigate, in a Rule 59(e) motion, the issue whether this Court's decision in *Elrod v. Burns*, 427 U.S. 347 (1976), applied retroactively. The Third Circuit did so, moreover, even though a trial could have been avoided had defendants successfully raised the issue earlier, and even though defendants' reasons for not raising the issue earlier were "unpersuasive" in light of the fact that the issue was open in the Third Circuit and other federal courts of appeals had decided it favorably to defendants. *Id.* at 1361. The Third Circuit

reached the merits in order "to vindicate one of the most fundamental jurisprudential concerns, evenhandedness in the administration of justice." *Id.* at 1362. In its view, this fundamental concern required it to apply the same rule of law to similarly situated litigants.

Both *Morris* and *Weaver* squarely conflict with the decision of the D.C. Circuit here. Neither the Eighth nor the Third Circuit requires that there be "exceptional circumstances" before a litigant may invoke a change of law by this Court in its favor. Neither Circuit, moreover, requires a litigant seeking to invoke such a change of law to demonstrate that the defense it seeks to raise was unavailable for all practical purposes when it first could have been asserted.

The two cases cited in the panel majority's amended decision in support of its Rule 59(e) ruling are not to the contrary. Thus, in *Grumman Aircraft Eng'g Corp. v. Renegotiation Board*, 482 F.2d 710 (D.C. Cir. 1973), *rev'd on other grounds*, 421 U.S. 168 (1975), the D.C. Circuit described Rule 59(e) as a "rule requiring *clearly available defenses*" to be raised before rehearing. *Id.* at 721 (emphasis added). And, in *Federal Deposit Ins. Corp. v. Meyer*, 781 F.2d 1260 (7th Cir. 1986), the Seventh Circuit stated that a proper Rule 59(e) motion "must clearly establish either a manifest error of law or fact or must present newly discovered evidence" and that, conversely, Rule 59(e) "cannot be used to raise arguments which could, and should, have been made before the judgment issued." *Id.* at 1268.

Under those tests, the District would have been permitted to invoke *Kay v. Ehrler* in its Rule 59(e) motion. The panel majority here never ruled, and could not rule, that the District had a "clearly available defense" at the time of the fee application. Furthermore, Judge Green's fee decision, as Judge Ginsburg observed, constitutes a manifest error of law. *See also infra* at 19-21.[8]

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[8] That the test adopted by the panel majority here is substantially different from the tests adopted in *Grumman* and *Meyer* is also illustrated by examining the facts of those cases. First, in *Grumman*, the moving

[Footnote continued on the next page]

In short, the Circuits are in conflict over an important and recurring issue that this Court should resolve — whether a litigant's reasonable reliance on the law of the Circuit in which his dispute is resolved precludes that litigant from invoking a supervening change of law by this Court in his favor.

III. A LITIGANT'S FAILURE TO DISPUTE ADVERSE APPLICABLE CIRCUIT LAW SHOULD NOT PRECLUDE IT FROM INVOKING A SUPERVENING DECISION BY THIS COURT IN ITS FAVOR.

A. Prior to *Kay v. Ehrler*, The Law In The District Of Columbia Was That *Pro Se* Attorneys May Recover Fees Under Federal Fee-Shifting Statutes.

The panel majority erred in ruling that the District committed a fatal misstep in 1988 by failing to attempt to distinguish the D.C. Circuit's 1977 decision in *Cuneo*. As Judge Ginsburg correctly recognized, the District had every reason to believe that *Cuneo* foreclosed a challenge to the *pro se* attorney's fee award here. In *Cuneo*, the D.C. Circuit treated the fee-shifting provision of FOIA like any other federal fee-shifting provision. Not only did it refer to "current federal attorney fee statutes," but it cited in support of its ruling a civil rights decision by the Fifth Circuit. 553 F.2d at 1366. Furthermore, the policies underlying FOIA's fee provision, which were cited in *Cuneo*, do not differ in any material respect from the policies underlying the fee provisions of federal civil rights statutes, including the IDEA. Thus, in 1988, given *Cuneo* and given this Court's longstand-

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[Footnote continued from the previous page]
party sought to invoke a legal defense so well-established that the court viewed the government's conduct as a deliberate by-pass. 482 F.2d at 722 (government was playing "cat and mouse"). Second, in neither *Grumman* nor *Meyer* could any claim have been made that the moving party reasonably relied on controlling Circuit precedent in not litigating an issue earlier. Third, in contrast to *Grumman* and *Meyer*, the trial court here decided the merits of the Rule 59(e) motion, and because there can be no claim that she abused her discretion in doing so, her merits decision was properly before the D.C. Circuit. Finally, both *Grumman* and *Meyer* involved factual matters.

ing command that similar language in federal fee-shifting statutes should ordinarily be consistently construed, the law of the D.C. Circuit was that an attorney who successfully represents himself in a case governed by a federal fee-shifting statute is entitled to fees.

The reasonableness of this interpretation is confirmed by post-1988 events in the D.C. Circuit. Thus, in *Jones v. Lujan*, 883 F.2d 1031 (D.C. Cir. 1989), the D.C. Circuit extended *Cuneo* to fees sought pursuant to the Equal Access to Justice Act ("EAJA"). In so ruling, the panel majority rejected the very arguments that this Court later found persuasive in *Kay v. Ehrler* and even characterized these arguments as "rather strange." *Id.* at 1034. Judge Silberman, in turn, who concurred in the judgment although he believed it to be wrong, explained that he was bound by *Cuneo*, even though *Cuneo* was a FOIA case, because he could find "no viable distinction . . . between the term 'reasonable attorney fees' in FOIA . . . and 'reasonable attorney fees' in EAJA . . .." *Id.* at 1036.

There was, therefore, no reasonable basis for believing, prior to *Kay v. Ehrler*, that the D.C. Circuit would have held that *pro se* attorneys may not recover fees under the IDEA, § 1988, or any other federal fee-shifting statute. Indeed, as Judge Ginsburg observed, the D.C. Circuit's 1991 affirmance of the district court's 1984 decision in *Lawrence* was based solely on *Kay v. Ehrler* and did not cite the varying-purposes distinction made by the district court in *Lawrence* and invoked by the panel majority here.

Finally, the reasonableness of the District's position in 1988 is underscored by a decision of the D.C. Circuit issued less than three weeks before the original decision in this case. In *Benavides v. Bureau of Prisons*, 993 F.2d 257 (D.C. Cir.), *cert. denied*, 114 S. Ct. 559 (1993), a three-judge panel (Mikva, C.J.; Edwards & Buckley, JJ.) held that *Kay v. Ehrler* bars an award of attorney's fees to a non-attorney *pro se* litigant who prevails in a FOIA case. In *Benavides*, the panel unanimously rejected arguments made by "extremely competent counsel," appointed by the court itself for the appeal,

that *Kay v. Ehrler* was distinguishable because the purposes of FOIA's fee provision differ from those of section 1988. *Id.* at 258 n.*. Not only did the panel reject these arguments, it ruled that they were "untenable" and "simply do not hold." *Id.* at 259, 260. In *Benavides*, therefore, the D.C. Circuit, when presented with the only distinction the District could have made between *Cuneo* and its own case, ruled that the distinction was indefensible.

In short, in this case, the D.C. Circuit has upheld an award of attorney's fees that Congress has not authorized and has thus violated its fundamental obligation to apply the law faithfully. The reason for its ruling is, moreover, seriously flawed. According to the panel majority, a litigant waives the right to invoke a change of law by this Court in its favor unless it attempts to distinguish a controlling adverse Circuit precedent so long as two judges hearing the appeal can articulate *hypothetically* a "reasonable" distinction between the two cases. A distinction can be deemed fatally "reasonable," moreover, even though, just three weeks earlier, the distinction has been held to be "untenable" by a unanimous three-judge panel of the same court (which included one judge who also believes it to be reasonable!).

Such a harsh standard cannot be the law. A litigant should not be required to attempt to distinguish the indistinguishable in order to invoke a change of law by this Court in its favor. Furthermore, as a general matter, a litigant should not be expected to anticipate that this Court will disagree with the law of the Circuit governing its case. Here, moreover, there was no reasonable ground to do so in the D.C. Circuit until *Kay v. Ehrler* was decided.

B. Fairness To Litigants And To Their Counsel, As Well As Judicial Efficiency, Require Review Here.

The D.C. Circuit's rule will result in great unfairness to litigants and to their trial counsel and in increased burdens on federal district courts. This is because in the federal judicial system, the only law that may exist on an issue is the law created by the Circuits. The law of a Circuit, even

if it is in conflict with the law of another Circuit, is binding on the litigants and the federal district court judges within the Circuit.

The D.C. Circuit's too-stringent waiver and Rule 59(e) standards will unfairly and unwisely force trial counsel to choose between the rock of waiver and the hard place of sanctions. Counsel will have to defend against a waiver argument if they fail to attempt to distinguish a Circuit precedent they reasonably believe to be controlling or they will have to defend against a motion for sanctions if they attempt to do so. And a busy district court judge will not be inclined, as was the panel majority here, to conclude that an untenable argument is nevertheless reasonable. Attorneys must be given some leeway to choose a course of action on behalf of their clients without fear of waiver or sanctions.

The dilemma created by the D.C. Circuit's rule cannot be avoided by the fact that a litigant can undertake the costly and risky task of seeking to overturn Circuit precedent that adversely affects its case in some way. First, not every litigant has the resources necessary to pursue such litigation and not every case involves the financial incentives that would make this course of action economically feasible. Second, except in the rarest of cases, review by this Court is far from certain, even when the decision below is wrong and even when there is a conflict among the Circuits. And *en banc* review by the federal courts of appeals is also rare. As a consequence, litigants should not forfeit their fundamental right to have their case decided according to the law simply because their trial counsel accept what reasonably appears to be adverse controlling Circuit precedent. On the contrary, litigants should be permitted to request a federal district court to revisit an issue after this Court has established a contrary precedent in their favor.[9]

[9] *See Morris v. American National Can Corp., supra* (although the defendant had foregone the opportunity to effect a change in the law, by seeking *en banc* review and/or review by this Court of the Circuit's decision that risk enhancement is permitted under federal fee-shifting statutes, the defendant was nevertheless entitled in the second appeal in the case to invoke the rule set forth in *Dague*).

The importance and unfairness of the D.C. Circuit's rule can be illustrated by two examples. First, at the time that *Kay v. Ehrler* was decided in April, 1991, there had been a conflict among the Circuits since at least 1983 over the issue whether FOIA (and presumably other federal fee-shifting statutes) permits an award of fees to attorneys who proceed *pro se*. *Compare Cuneo, supra, with Falcone v. IRS*, 714 F.2d 646 (6th Cir. 1983), *cert. denied*, 466 U.S. 908 (1984) (fees not permitted). This Court declined to resolve the conflict on at least two occasions, in 1984, when it declined to review *Falcone*, and in 1986, when it declined to review, over the dissent of two Justices, *Poythress v. Kessler*, 475 U.S. 1129 (1986), involving 42 U.S.C. § 1988. As a consequence, throughout much of the 1980's, the law governing the issue of fees for *pro se* attorneys was the conflicting law established by the various Circuits and the prospect of a resolution of this conflict by this Court seemed dim. In these circumstances, litigants who have the misfortune to be parties to cases governed by adverse Circuit precedent that is overturned by this Court during the litigation should not have their rights governed by a wrong legal rule merely because they reasonably believed that they were bound by that precedent.

A second example is derived from the events following this Court's 1987 decision in *Delaware Valley II*. In *Delaware Valley II*, this Court was unable to resolve definitively whether federal fee-shifting statutes permit a lodestar fee award to be enhanced in cases taken on a contingent-fee basis. Following *Delaware Valley II*, every federal court of appeals, up until December 13, 1991, had ruled that enhancement of the lodestar to reflect risk was permissible under the typical federal fee-shifting statute and, for the most part, had done so on the ground that Justice O'Connor's concurring opinion in *Delaware Valley II* was controlling.[10] In June, 1992,

[10] On December 13, 1991, the D.C. Circuit, sitting *en banc*, reversed its own Circuit precedent and ruled that risk enhancement is never permitted under the typical federal fee-shifting statute. *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991), *cert. denied sub nom., King v. Ridley*, 112 U.S. 3054 (1992). The decisions of the other Circuits are collected in the Petition for a Writ of Certiorari filed in *King*.

however, this Court in *Dague* rejected the nearly unanimous position of the Circuits and ruled that risk enhancement is never permitted. In these circumstances, it would be unfair to require defendants throughout the country to pay risk enhancements to prevailing plaintiffs' counsel because, until *Dague*, they reasonably believed they were foreclosed by Circuit precedent from arguing that risk enhancement is never permitted under the typical federal fee-shifting statute.

Finally, judicial efficiency favors a rule that ordinarily permits a litigant to raise at the trial level a supervening decision of this Court overturning what had been the law of the Circuit governing his case and that does not require, as a condition of doing so, an attempt to distinguish what reasonably appears to be indistinguishable. Federal district court judges should not be asked to make a distinction between a Circuit court decision, which they are bound to follow, and the case before them, which is so tenuous that even moving counsel does not believe it is reasonable. The inevitable and costly result of the D.C. Circuit's rule, however, is to require trial counsel to raise such matters and federal courts to decide them, and to generate collateral sanctions litigation.

CONCLUSION

This case raises an important and constantly recurring issue that has been wrongly decided by the D.C. Circuit and that should be resolved by this Court. This Court should grant the petition for a writ of certiorari and reverse the decision below.

Respectfully submitted,

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(2) Supreme Court, U.S.
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No. 93-

In the Supreme Court of the United States

OCTOBER TERM, 1993

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

SARAH KATTAN, BY HER PARENTS AND NEXT FRIENDS, SUSAN J. THOMAS AND JOSEPH KATTAN, *et al.*,
Respondents.

Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Sarah KATTAN, By Her Parents and Next Friends Susan J. THOMAS and Joseph Kattan, et al., Appellees and Cross-Appellants,

v.

DISTRICT OF COLUMBIA, et al., Appellants and Cross-Appellees.

Nos. 92-7011 and 92-7012.

United States Court of Appeals,
District of Columbia Circuit.

Argued April 7, 1993.
Decided June 15, 1993.
As Amended June 30, 1993.

Donna M. Murasky, Asst. Corp. Counsel, with whom John Payton, Corp. Counsel, and Charles L. Reischel, Deputy Corp. Counsel, Washington, DC, were on the brief, for appellants/cross-appellees.

Patricia D. Douglass, Washington, DC, for appellees/cross-appellants.

Before MIKVA, Chief Judge; D.H. GINSBURG and SENTELLE, Circuit Judges.

Opinion for the Court filed by Chief Judge MIKVA.

Opinion concurring in part and dissenting in part filed by Circuit Judge D.H. GINSBURG.

MIKVA, Chief Judge:

Appellants Sarah Kattan and her parents prevailed in a suit against the District of Columbia under the Education for All Handicapped Children Act. 20 U.S.C. §§ 1400-1485. They subsequently applied to the district court for attorneys' fees based on the fee-shifting provision of the Handicapped Children's Protection Act. 20 U.S.C. §1415(e)(4)(B). They requested fees for the services provided by their attorney, Ms. Patricia Douglass, as well as those provided by Mr. Kattan

himself, a lawyer who served as co-counsel to Ms. Douglass. The District of Columbia did not question Mr. Kattan's entitlement to fees, and, approximately three years later, the district court issued a fee award which reflected the labors of both Mr. Kattan and Ms. Douglass.

In the period between the Kattans' fee request and the district court's award, the Supreme Court decided *Kay v. Ehrler*, —— U.S. ——, 111 S.Ct. 1435, 113 L.Ed. 2d 486 (1991), in which it held that an attorney representing himself in a civil rights action was not eligible for attorneys' fees. Two weeks after the district court issued the fee award, the District of Columbia filed a motion in district court pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, requesting that the court eliminate the fees for Mr. Kattan's services, in light of *Kay v. Ehrler*. The district court rejected this motion.

The District of Columbia appeals the district court's award of fees for Mr. Kattan, arguing that *Kay v. Ehrler* compels a contrary result. In a cross-appeal, the Kattans challenge the district court's decision to award fees for Ms. Douglass at a rate of $125 per hour, instead of the $150 per hour that the Kattans requested. For the reasons explained below, we uphold the district court's fee award in all repsects.

I. BACKGROUND

Mr. Joseph Kattan and Ms. Susan J. Thomas, the parents of Sarah Kattan, filed a suit on Sarah's behalf in district court against the District of Columbia. The Kattans alleged that the District had placed Sarah, a disabled child, in a school that was inappropriate under the Education for All Handicapped Children Act ("EHA"), 20 U.S.C. §§ 1400–1485. Initially, Mr. Kattan, an attorney, represented his family. Later, at the urging of the district court, he secured Mr. Patricia Douglass as co-counsel.

The district court ultimately held for the Kattans, on August 9, 1988. It determined that Sarah would not receive all of the services guaranteed to her by the EHA at the school to which the District had assigned her, and it ordered the

District to place her at a private school at public expense. Soon thereafter, on October 11, 1988, the Kattans filed an application for attorneys' fees for both Mr. Kattan and Ms. Douglass, under the relevant provision of the Handicapped Children's Protection Act ("HCPA"), 20 U.S.C. § 1415(e)(4)(B)("In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardians of a handicapped child or youth who is the prevailing party.") The District promptly filed an opposition to the application in which it argued that the amounts requested were too high. The District did not, however, contest the right of an attorney representing himself and his child to receive a fee award under the statute.

It was not until nearly three years later, on October 17, 1991, that the district court finally entered an order awarding fees of $38,000 to Ms. Douglass and $43,050 to Mr. Kattan. In the interim, on April 16, 1991, the Supreme Court had decided *Kay v. Ehrler*, in which the Court ruled that attorneys' fees may not be awarded to attorneys representing themselves in civil rights actions under the fee provision of 42 U.S.C. § 1988 ("[T]he court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.").

On October 31, 1991, the District of Columbia filed a motion in the district court, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, to alter or amend the October 17 order awarding attorneys' fees. In the motion, the District contended, for the first time, that a *pro se* litigant who is also a lawyer is not eligible for attorney's fees under the HCPA. The District argued that the Supreme Court's reasoning in *Kay v. Ehrler*, as to 42 U.S.C. § 1988, required the district court to reverse its decision to award attorney's fees to Mr. Kattan under the analogous fee provision of the HCPA. The district court, however, denied the motion on December 11, 1991, holding that the District of Columbia had waived the issue of Mr. Kattan's entitlement to fees by not raising it before the district court awarded fees on October 17, 1991.

The District of Columbia appeals the district court's orders of October 17 and December 11, 1991, insofar as they award attorney's fees to Appellees for time expended on the case by Mr. Kattan. The Kattans, in turn, issue a cross-appeal against the October 17 order to the extent that it limits attorney's fees for Ms. Douglass' services to the rate of $125 per hour, instead of the requested $150 per hour.

II. ANALYSIS

A. Mr. Kattan's Entitlement to Attorney's Fees

The HCPA provides, "In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of costs to the parents or guardian of a handicapped child or youth who is the prevailing party." 20 U.S.C. § 1415(e)(4)(B). The District asserts that, in light of *Kay v. Ehrler*, an attorney representing himself is not eligible for a fee award under the HCPA. We do not find it necessary to consider this issue. We agree with the district court that the District of Columbia waived its argument against the availability of fee awards to *pro se* litigants by failing to raise it in 1988 in its original opposition to the Kattans' motion for fees.

[1] The District of Columbia claims that the district court erred by rejecting its Rule 59(e) motion to alter or amend the judgment awarding fees to Mr. Kattan. In that motion, the District asserted that *Kay v. Ehrler* represented a change of law that it could not reasonably have anticipated, and that the Supreme Court decision required the district court to retract its award of fees for Mr. Kattan's services. The district court held that *Kay* was not an unanticipated change in the law and that the District had therefore waived its argument against Mr. Kattan's entitlement to attorney's fees by not raising it before judgment.

We affirm the district court's finding of a waiver. In analogous circumstances, this Court has recognized that a losing party may not use a Rule 59 motion to raise new issues that could have been raised previously.

> Ordinarily Rule 59 motions for either a new trial or a rehearing are not granted by the District Court where they are used by a losing party to request the trial judge to reopen proceedings in order to consider a new defensive theory which could have been raised during the original proceedings.

Grumman Aircraft Engineering Corp. v. Renegotiation Board, 482 F.2d 710, 711 (D.C. Cir. 1973), *overruled on different grounds*, 421 U.S. 168, 95 S.Ct. 1491, 44 L.Ed.2d 57 (1975). *See also Fed. Deposit Ins. Corp. v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986) (Rule 59(e) motion "cannot be used to raise arguments which could, and should, have been made before the judgment issued.").

In 1988, when it opposed the Kattans' application for attorneys' fees, the District of Columbia could have proffered a legitimate argument that such fees were not available to *pro se* litigants under the HCPA. Although the Supreme Court did not decide *Kay* until 1991, there was no reason in 1988 for the District of Columbia to assume that this Circuit had conclusively confirmed the availability of a fee award to a *pro se* litigant in an EHA suit or other civil rights case.

At the time, the only binding precedent in our Circuit on the issue of fee awards to lawyers representing themselves related to the fee-shifting provision of the Freedom of Information Act ("FOIA"). *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977). That decision held that attorneys acting *pro se* could receive fees under FOIA. *Id.* at 1366. However, much of the Court's reasoning in that decision related specifically to the "policy considerations underlying FOIA." *Id.* Consequently, the District of Columbia had no basis to believe that *Cuneo* settled the HCPA question. If the District wished to claim that Mr. Kattan was ineligible for attorney's fees under the HCPA, it should have attempted to distinguish *Cuneo* from the present case in the district court. Such an argument would have been far from frivolous.

Indeed, in 1984, similarly situated litigants, the defendants in a civil rights action, argued, despite this Circuit's decision in *Cuneo*, that a lawyer representing himself was not

entitled to attorney's fees under 42 U.S.C. §1988. *Lawrence v. Staats*, 586 F.Supp. 1375 (D.D.C. 1984), *aff'd sub nom. Lawrence v. Bowsher*, 931 F.2d 1579 (D.C. Cir. 1991) (on the grounds stated by *Kay v. Ehrler*). Not only did the defendants in *Lawrence* raise this issue—the district court agreed with them. Judge Flannery, in a well-reasoned opinion, explicitly distinguished cases permitting *pro se* attorneys' fees in FOIA suits from cases dealing with fee-shifting in civil rights actions. He cited a series of cases from other circuits holding that *pro se* plaintiffs were not entitled to attorneys' fees under § 1988, and he stated:

> The court finds the statutory analysis and reasoning of these cases persuasive, and does not believe that this Circuit's allowance of attorney fees to *pro se* litigants in FOIA cases changes the analysis, since the intent of Congress and purpose of FOIA and its fee provisions differ significantly from the intent and purposes of §§ 1988 and [42 U.S.C. §] 2000e-5(k).

Id. at 1379.

In the present case, the District of Columbia was in a better position than were the defendants in *Lawrence* to realize that a challenge to a *pro se* plaintiff's attorney's fees might succeed, for the District could look to *Lawrence* itself as an example. It is also worth noting that the Kattans flagged the issue in a footnote in their application for fees. Nevertheless, in its opposition to the Kattans' application, the District chose not to raise the question of the availability of fees for *pro se* litigants. We therefore agree with the district court that the District of Columbia waived the issue of Mr. Kattan's eligibility for fees by not raising it in a timely manner. The district court clearly did not abuse its discretion by denying the District's Rule 59(e) motion.

[2] Alternatively, the District of Columbia asserts that we should, in light of the change in law brought about by *Kay v. Ehrler*, use our power under 28 U.S.C. § 2106 to review the issue of a *pro se* litigant's eligibility for fees. That section states, "The Supreme Court or any other court of appellate

jurisdiction may . . . vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review and direct the entry of such appropriate judgment, decree or order . . . as may be just under the circumstances."

The District is correct that although we do not ordinarily pass on issues that a party failed to raise in a timely fashion in the district court, we sometimes do review such issues when a supervening decision changes the law in the appellant's favor. On occasion, courts of appeals have justified this practice partly on the basis of 28 U.S.C. § 2106. *See, e.g., Pendergrast v. United States*, 416 F.2d 776, 780–81 & n. 19 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 926, 89 S.Ct. 1782, 123 L.Ed.2d 243 (1969). More often, appeals courts seem to have relied primarily on their intrinsic powers to achieve a just resolution. The Supreme Court noted long ago:

> We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. An[d] in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered.

Patterson v. Alabama, 294 U.S. 600, 607, 55 S.Ct. 575, 578, 79 L.Ed. 1082 (1935). *See also, Hormel v. Helvering*, 312 U.S. 552, 558, 61 S.Ct. 719, 722, 85 L.Ed. 1037 (1941) ("[Our decisions], while recognizing the desirability and existence of a general practice under which appellate courts confine themselves to the issues raised below, nevertheless do not lose sight of the fact that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice."); *Leary v. United States*, 395 U.S. 6, 27–28, 89 S.Ct. 1532, 1543–44, 23 L.Ed.2d 57 (1969); *United States v. Byers*, 740 F.2d 1104, 1115–16 n. 11 (D.C. Cir. 1984).

In each of the cases cited above, the intervening decision enunciated a new legal principle that was previously unavailable to the appellant, for all practical purposes. The present case, on the other hand, does not fit this paradigm.

As we explained above the District of Columbia could have validly disputed Mr. Kattan's entitlement to fees before the Supreme Court decided *Kay v. Ehrler*. Absent "exceptional circumstances," the court of appeals is not a forum in which a litigant can present legal theories that it neglected to raise in a timely manner in proceedings below. *See Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor v. Edward Minte Co.*, 803 F.2d 731, 736 (D.C. Cir. 1986). No such exceptional circumstances exist in this case.

B. Ms. Douglass' Rate

In a cross-appeal, the Kattans allege that the district court abused its discretion by awarding them attorney's fees for Ms. Douglass' work at a rate of $125 per hour. The district court set Ms. Douglass' rate at this amount, despite the fact that the Kattans submitted a declaration stating that Ms. Douglass' normal billing rate in her private practice was $150 per hour. For the reasons stated below, we uphold the district court's calculation of fees for Ms. Douglass' services.

The HCPA provides that "fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished." 20 U.S.C. § 1451(e)(4)(C). Both parties agree that an attorney's usual billing rate is presumptively the reasonable rate, provided that this rate is "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 895-96 n. 11, 104 S.Ct. 1541, 1547 n. 11, 79 L.Ed.2d 891 (1984). The parties disagree as to whether the district court was justified, under this principle, in setting Ms. Douglass' rate at $125 instead of her normal billing rate of $150.

[3, 4] A district court's discretion as to the proper hourly rate to award counsel should not be upset absent clear misapplication of legal principles, arbitrary fact finding, or unprincipled disregard for the record evidence. *King v. Palmer*, 950 F.2d 771, 786 (D.C. Cir. 1991) (*en banc*), *cert. denied*, —— U.S. ——, 112 S.Ct. 1290, 117 L.Ed.2d 514 (1992) & —— U.S. ——, 112 S.Ct. 3054, 120 L.Ed.2d 920 (1992). No such pro-

blems exist in the district court's fee award. The district court applied the law correctly and considered all the available evidence in setting the disputed rate.

The following evidence was available for the district court to consider when it established Ms. Douglass' rate: (1) an affidavit submitted by Ms. Douglass, stating her standard rate of $150 per hour and summarizing her education and experience; (2) a declaration by a local expert retained by the Kattans, setting out broad ranges of fees generally charged by attorneys with various levels of experience in Washington, D.C.; and (3) reports of similar cases in which fees were awarded for comparable work.

In its opposition to the Kattan's application for attorneys' fees, the District suggested that the district court award Ms. Douglass' fees at $75 per hour, the same rate awarded in *Stebbing v. District of Columbia*, another EHA case. C.A. No. 86-2549 (D.D.C. March 2, 1988). The district court, however, refused to set the rate at $75 per hour, because in *Stebbing* "the litigation was not very complicated." On the other hand, the district court noted that "other analogous decisions in this circuit have awarded attorneys' fees of $125 for partner time." The court specifically referred to *Moore v. District of Columbia*, 674 F.Supp. 901 (D.D.C. 1987), an EHA case handled by a leading EHA firm in the District. The district court further noted that the plaintiffs had failed to cite a single case in which the fee award was greater than $125.

"In light of the relevant case law and the affidavits submitted by Ms. Douglass," the district court reasonably determined that $125, a figure within the expert's range for attorneys with Ms. Douglass' experience, was the prevailing community rate for Ms. Douglass' services. In setting the fee, the district court considered Ms. Douglass' professional history, the complexity of the case, and the fees awarded in similar cases to attorneys with similar experience. Nothing more was required. Keeping sight of the deference which we owe the district court's fee determinations, we find no reason to overturn the district court's decision.

Finally, the Kattans contend that the district court erred by failing, when establishing Ms. Douglass' rate, to take into account a subparagraph of the HCPA, 20 U.S.C. § 1415(e)(4)(G). That subparagraph provides that the court should not reduce attorneys' fees that "unreasonably exceed[ ] the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation," as it is required to by § 1415(e)(4)(F)(ii), if it finds that "the State or local educational agency unreasonably protracted the final resolution of the action or proceeding."

In 1988, the Kattans, asserting that the District had unreasonably protracted the litigation, moved for sanctions against the District under 20 U.S.C. § 1415(e)(4)(G), as well as under 28 U.S.C. § 1927 and Rule 11 of the Federal Rules of Civil Procedure. The Kattans argued in their supporting memoranda that the District's dilatory tactics warranted a greater fee award than that permitted under the HCPA's basic fee-shifting provision.

The Kattans contend that the district court neglected to consider their § 1415(e)(4)(G) claim. In its order of October 1, 1991, the district court expressly rejected the Kattans' motion for sanctions, stating that "[a]lthough defendants' conduct in this case was far from exemplary, it does not rise to the level of conduct necessary for the imposition of sanctions under Fed.R.Civ. P. 11 or 28 U.S.C. § 1927." Although the district court did not explicitly mention § 1415(e)(4)(G), it implicitly rejected the Kattans' claim under that provision as well, since the Kattans relied on all three provisions in the same motion. In any case, the court clearly made findings as to the blameworthiness of the District's conduct sufficient to reject the Kattans' § 1415(e)(4)(G) claim. We are in no position to second-guess the district court's judgment as to whether the District of Columbia's tactics were unreasonable enough to warrant the award of extra fees.

III. CONCLUSION

Because the District of Columbia did not contest Mr. Kattan's entitlement to attorney's fees in its original opposi-

tion to the Kattans' application for fees, we find that the District waived the issue and cannot raise it for the first time on appeal. We further hold that the district court was justified in setting Ms. Douglass' fees at $125 per hour. We therefore uphold the district court's fee award in all respects.

It is so ordered.

D.H. GINSBURG, Circuit Judge, concurring in part and dissenting in part:

The district court decided that *Kay v. Ehrler*, —— U.S. ——, 111 S.Ct. 1435 113 L.Ed.2d 486 (1991), in which the Supreme Court held that a *pro se* litigant is not entitled to an attorney's fee under 42 U.S.C. § 1988, does not bar the award of an attorney's fee to a *pro se* litigant under the Handicapped Children's Protection Act. The reason? Simply that "plaintiffs' motion for fees is based on the EHA, a different statutory scheme from that which formed the basis of the *Kay v. Ehrler* decision." *Kattan v. District of Columbia*, No. 88-0630 (D.D.C. December 11, 1991), slip op. at 3. This is the proverbial distinction without a difference.

The fee-shifting provision of the HCPA is practically identical to that of § 1988, and the Supreme Court has long required that similar fee-shifting provisions in federal statutes be interpreted in the same way. *See, e.g., Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n. 2, 109 S.Ct. 2732, 2735 n. 2, 105 L.Ed.2d 639 (1989) ("We have stated that fee-shifting statutes' similar language is 'a strong indication' that they are to be interpreted alike"); *Hensley v. Eckerhart*, 461 U.S. 424, 433 n. 7, 103 S.Ct. 1933, 1939 n. 7, 76 L.Ed.2d 40 (1983) (same standards for awarding attorney's fee apply under all statutes authorizing award of fee to a "prevailing party"); *Northcross v. Board of Education*, 412 U.S. 427, 428, 93 S.Ct. 2201, 2202, 37 L.Ed.2d 48 (1973) (similarity in wording of two statutory fee-shifting provisions is a "strong indication that the two statutes should be interpreted *pari passu*").

The Court in *Kay v. Ehrler* also stated that "the word 'attorney' assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under § 1988." —— U.S. ——, 111 S.Ct. at 1437. I see no reason to think that the word

"attorney" in the fee-shifting provision of §1988 has a different meaning than it has in the fee-shifting provision of the HCPA. The district court's cursory "analysis" surely offers none.

The district court's grant of a fee for the work performed by Mr. Kattan was clearly an error. The court, however, declines to reach the merits of that question, *See* Ct.Op. at 5, holding that "the District of Columbia waived the issue of Mr. Kattan's eligibility for fees by not raising it in the district court in a timely manner." Ct.Op. at 8. I disagree.

The District of Columbia had no reason in 1988 to anticipate that the Supreme Court would in 1991 change the law of this circuit, which then authorized the district court to award an attorney's fee to a *pro se* litigant. On the contrary, the district court was clearly bound both by *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977), which held that a *pro se* lawyer was eligible for fees under the Freedom of Information Act, and by the Supreme Court's longstanding command that similarly-worded fee-shifting provisions are to be treated alike. The distinction the district court drew in *Lawrence v. Staats*, 586 F.Supp. 1375 (D.D.C. 1984), between the fee provision of the FOIA and that of § 1988 ran contrary to the Supreme Court's approach. *See Lawrence v. Bowsher*, 931 F.2d 1579, 1580 (D.C. Cir. 1991) (affirming "[s]olely" on the basis of intervening Supreme Court decision in *Kay v. Ehrler*, which overruled *Cuneo*). *But see* Ct.Op. at 277 (lauding the district court for "a well-reasoned opinion" in *Lawrence v. Staats*).

It is simply unreasonable to penalize the District of Columbia for failing to have argued a distinction (between the fee provision of the FOIA and that of the HCPA) that the district court would have been required to reject under Supreme Court and circuit precedent. By holding that the District waived the issue of Mr. Kattan's eligibility for fees, the court is in effect punishing a litigant for not making what would have been at the time an almost frivolous argument.

Finding no waiver of the District's objection, I respectfully dissent from the court's decision affirming the award of an attorney's fee to the *pro se* plaintiff.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 7, 1993 Decided June 15, 1993

Nos. 92-7011 and 92-7012

SARAH KATTAN, BY HER PARENTS AND NEXT FRIENDS SUSAN J. THOMAS AND JOSEPH KATTAN, *ET AL.*,
APPELLEES AND CROSS-APPELLANTS

v.

DISTRICT OF COLUMBIA, *ET AL.*,
APPELLANTS AND CROSS-APPELLEES

Appeal from the United States District Court
for the District of Columbia
(88cv00630)

Donna M. Murasky, Assistant Corporation Counsel, with whom *John Payton*, Corporation Counsel, and *Charles L. Reischel*, Deputy Corporation Counsel, were on the brief, for appellants/cross-appellees.

Patricia D. Douglass for appellees/cross-appellants.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before MIKVA, *Chief Judge*; D.H. GINSBURG and SENTELLE, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* MIKVA.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* D.H. GINSBURG.

MIKVA, *Chief Judge*: Appellants Sarah Kattan and her parents prevailed in a suit against the District of Columbia under the Education for All Handicapped Children Act. 20 U.S.C. §§ 1400–1485. They subsequently applied to the district court for attorneys' fees based on the fee-shifting provision of the Handicapped Children's Protection Act. 20 U.S.C. § 1415(e)(4)(B). They requested fees for the services provided by their attorney, Ms. Patricia Douglass, as well as those provided by Mr. Kattan himself, a lawyer who served as co-counsel to Ms. Douglass. The District of Columbia did not question Mr. Kattan's entitlement to fees, and, approximately three years later, the district court issued a fee award which reflected the labors of both Mr. Kattan and Ms. Douglass.

In the period between the Kattans' fee request and the district court's award, the Supreme Court decided *Kay v. Ehrler*, 111 S. Ct. 1435 (1991), in which it held that an attorney representing himself in a civil rights action was not eligible for attorneys' fees. Two weeks after the district court issued the fee award, the District of Columbia filed a motion in district court pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, requesting that the court eliminate the fees for Mr. Kattan's services, in light of *Kay v. Ehrler*. The district court rejected this motion.

The District of Columbia appeals the district court's award of fees for Mr. Kattan, arguing that *Kay v. Ehrler* compels a contrary result. In a cross-appeal, the Kattans challenge the district court's decision to award fees for Ms. Douglass at a rate of $125 per hour, instead of the $150 per hour that the Kattans requested. For the reasons explained below, we uphold the district court's fee award in all respects.

I. BACKGROUND

Mr. Joseph Kattan and Ms. Susan J. Thomas, the parents of Sarah Kattan, filed a suit on Sarah's behalf in district court against the District of Columbia. The Kattans alleged that the District had placed Sarah, a disabled child, in a school that was inappropriate under the Education for All Handicapped Children Act ("EHA"), 20 U.S.C. §§ 1400–1485. Initially, Mr. Kattan, an attorney, represented his family. Later, at the urging of the district court, he secured Ms. Patricia Douglass as co-counsel.

The district court ultimately held for the Kattans, on August 9, 1988. It determined that Sarah would not receive all of the services guaranteed to her by the EHA at the school to which the District had assigned her, and it ordered the District to place her at a private school at public expense. Soon thereafter, on October 11, 1988, the Kattans filed an application for attorneys' fees for both Mr. Kattan and Ms. Douglass, under the relevant provision of the Handicapped Children's Protection Act ("HCPA"), 20 U.S.C. § 1415(e)(4)(B) ("In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardians of a handicapped child or youth who is the prevailing party.") The District promptly filed an opposition to the application in which it argued that the amounts requested were too high. The District did not, however, contest the right of an attorney representing himself and his child to receive a fee award under the statute.

It was not until nearly three years later, on October 17, 1991, that the district court finally entered an order awarding fees of $38,000 to Ms. Douglass and $43,050 to Mr. Kattan. In the interim, on April 16, 1991, the Supreme Court had decided *Kay v. Ehrler*, in which the Court ruled that attorneys' fees may not be awarded to attorneys representing themselves in civil rights actions under the fee provision of 42 U.S.C. § 1988 ("[T]he court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.").

On October 31, 1991, the District of Columbia filed a motion in the district court, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, to alter or amend the October 17 order awarding attorneys' fees. In the motion, the District contended, for the first time, that a *pro se* litigant who is also a lawyer is not eligible for attorney's fees under the HCPA. The District argued that the Supreme Court's reasoning in *Kay v. Ehrler*, as to 42 U.S.C. § 1988, required the district court to reverse its decision to award attorney's fees to Mr. Kattan under the analogous fee provision of the HCPA. The district court, however, denied the motion on December 11, 1991, holding that the District of Columbia had waived the issue of Mr. Kattan's entitlement to fees by not raising it before the district court awarded fees on October 17, 1991.

The District of Columbia appeals the district court's orders of October 17 and December 11, 1991, insofar as they award attorney's fees to Appellees for time expended on the case by Mr. Kattan. The Kattans, in turn, issue a cross-appeal against the October 17 order to the extent that it limits attorney's fees for Ms. Douglass' services to the rate of $125 per hour, instead of the requested $150 per hour.

II. ANALYSIS

A. Mr. Kattan's Entitlement to Attorney's Fees

The HCPA provides, "In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of costs to the parents or guardian of a handicapped child or youth who is the prevailing party." 20 U.S.C. § 1415(e)(4)(B). The District asserts that, in light of *Kay v. Ehrler*, an attorney representing himself is not eligible for a fee award under the HCPA. We do not find it necessary to consider this issue. We agree with the district court that the District of Columbia waived its argument against the availability of fee awards to *pro se* litigants by failing to raise it in 1988 in its original opposition to the Kattans' motion for fees.

As a preliminary matter, we must address the District of Columbia's claim that the district court erred by rejecting its Rule 59(e) motion to alter or amend the judgement awarding fees to Mr. Kattan. In that motion, the District asserted that *Kay v. Ehrler* represented a change of law that it could not reasonably have anticipated, and that the Supreme Court decision required the district court to retract its award of fees for Mr. Kattan's services. The district court held that *Kay* was not an unanticipated change in the law and that the District had therefore waived its argument against Mr. Kattan's entitlement to attorney's fees by not raising it before judgment.

We hold that the district court should not have reached the merits of the District of Columbia's motion. Rule 59(e) of the Federal Rules of Civil Procedure states, "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." FED. R. CIV. P. 59(e). In this case, fourteen days passed between the district court's award of attorneys' fees and the District of Columbia's filing of its Rule 59(e) motion. The district court therefore should have rejected the motion as untimely. "Rule 59(e) motions are expressly limited to the 10–day period following entry of judgment, and the District Court simply has no power to extend that time limitation." *Center for Nuclear Responsibility, Inc., v. United States Nuclear Regulatory Comm'n*, 781 F.2d 935, 941 (D.C. Cir. 1986).

Alternatively, the District of Columbia asserts that we should, in light of the change in law brought about by *Kay v. Ehrler*, use our power under 28 U.S.C. § 2106 to review the issue of a *pro se* litigant's eligibility for fees. That section states, "The Supreme Court or any other court of appellate jurisdiction may ... vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review and direct the entry of such appropriate judgment, decree or order ... as may be just under the circumstances."

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changes the law in the appellant's favor. On occasion, courts of appeals have justified this practice partly on the basis of 28 U.S.C. § 2106. *See, e.g., Pendergrast v. United States*, 416 F.2d 776, 780–81 & n.19 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 926 (1969). More often, appeals courts seem to have relied primarily on their intrinsic powers to achieve a just resolution. The Supreme Court noted long ago:

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In each of the cases cited above, the intervening decision enunciated a new legal principle that was previously unavailable to the appellant, for all practical purposes. The present case, on the other hand, does not fit this paradigm. In 1988, at the time it opposed the Kattans' application for attorneys' fees, the District of Columbia could have proffered a legitimate argument that such fees were not available to *pro se* litigants under the HCPA. There was no reason in 1988 for the District of Columbia to assume that this Circuit had conclusively confirmed the availability of a fee award to a *pro se* litigant in an EHA suit or other civil rights case.

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Indeed, in 1984, similarly situated litigants, the defendants in a civil rights action, argued, despite this Circuit's decision in *Cuneo*, that a lawyer representing himself was not entitled to attorney's fees under 42 U.S.C. § 1988. *Lawrence v. Staats*, 586 F. Supp. 1375 (D.D.C. 1984), *aff'd sub nom. Lawrence v. Bowsher*, 931 F.2d 1579 (D.C. Cir. 1991) (on the grounds stated by *Kay v. Ehrler*). Not only did the defendants in *Lawrence* raise this issue—the district court agreed with them. Judge Flannery, in a well-reasoned opinion, explicitly distinguished cases permitting *pro se* attorneys' fees in FOIA suits from cases dealing with fee-shifting in civil rights actions. He cited a series of cases from other circuits holding that *pro se* plaintiffs were not entitled to attorneys' fees under § 1988, and he stated:

> The court finds the statutory analysis and reasoning of these cases persuasive, and does not believe that this Circuit's allowance of attorney fees to *pro se* litigants in FOIA cases changes the analysis, since the intent of Congress and purpose of FOIA and its fee provisions differ significantly from the intent and purposes of §§ 1988 and [42 U.S.C. §] 2000e–5(k).

Id. at 1379.

In the present case, the District of Columbia was in a better position than were the defendants in *Lawrence* to realize that a challenge to a *pro se* plaintiff's attorney's fees might succeed, for the District could look to *Lawrence* itself as an example. It is also worth noting that the Kattans

flagged the issue in a footnote in their application for fees. Nevertheless, in its opposition to the Kattans' application, the District chose not to raise the question of the availability of fees for *pro se* litigants. We agree, therefore, that the District of Columbia waived the issue of Mr. Kattan's eligibility for fees by not raising it in the district court in a timely manner. Absent "exceptional circumstances," the court of appeals is not a forum in which a litigant can present legal theories that it neglected to raise in proceedings below. *See Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor v. Edward Minte Co.*, 803 F.2d 731, 736 (D.C. Cir. 1986). No such exceptional circumstances exist in this case.

B. Ms. Douglass' Rate

In a cross-appeal, the Kattans allege that the district court abused its discretion by awarding them attorney's fees for Ms. Douglass' work at a rate of $125 per hour. The district court set Ms. Douglass' rate at this amount, despite the fact that the Kattans submitted a declaration stating that Ms. Douglass' normal billing rate in her private practice was $150 per hour. For the reasons stated below, we uphold the district court's calculation of fees for Ms. Douglass' services.

The HCPA provides that "fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished." 20 U.S.C. § 1415(e)(4)(C). Both parties agree that an attorney's usual billing rate is presumptively the reasonable rate, provided that this rate is "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 895–96 n.11 (1984). The parties disagree as to whether the district court was justified, under this principle, in setting Ms. Douglass' rate at $125 instead of her normal billing rate of $150.

A district court's discretion as to the proper hourly rate to award counsel should not be upset absent clear misapplication of legal principles, arbitrary fact finding, or unprincipled

disregard for the record evidence. *King v. Palmer*, 950 F.2d 771, 786 (D.C. Cir. 1991) (*en banc*), *cert. denied*, 112 S. Ct. 1290 (1992) & 112 S. Ct. 3054 (1992). No such problems exist in the district court's fee award. The district court applied the law correctly and considered all the available evidence in setting the disputed rate.

The following evidence was available for the district court to consider when it established Ms. Douglass' rate: (1) an affidavit submitted by Ms. Douglass, stating her standard rate of $150 per hour and summarizing her education and experience; (2) a declaration by a local expert retained by the Kattans, setting out broad ranges of fees generally charged by attorneys with various levels of experience in Washington, D.C.; and (3) reports of similar cases in which fees were awarded for comparable work.

In its opposition to the Kattans' application for attorneys' fees, the District suggested that the district court award Ms. Douglass' fees at $75 per hour, the same rate awarded in *Stebbing v. District of Columbia*, another EHA case. C.A. No. 86–2549 (D.D.C. March 2, 1988). The district court, however, refused to set the rate at $75 per hour, because in *Stebbing* "the litigation was not very complicated." On the other hand, the district court noted that "other analogous decisions in this circuit have awarded attorneys' fees of $125 for partner time." The court specifically referred to *Moore v. District of Columbia*, 674 F. Supp. 901 (D.D.C. 1987), an EHA case handled by a leading EHA firm in the District. The district court further noted that the plaintiffs had failed to cite a single case in which the fee award was greater than $125.

"In light of the relevant case law and the affidavits submitted by Ms. Douglass," the district court reasonably determined that $125, a figure within the expert's range for attorneys with Ms. Douglass' experience, was the prevailing community rate for Ms. Douglass' services. In setting the fee, the district court considered Ms. Douglass' professional history, the complexity of the case, and the fees awarded in similar cases to attorneys with similar experience. Nothing

more was required. Keeping sight of the deference which we owe the district court's fee determinations, we find no reason to overturn the district court's decision.

Finally, the Kattans contend that the district court erred by failing, when establishing Ms. Douglass' rate, to take into account a subparagraph of the HCPA, 20 U.S.C. § 1415(e)(4)(G). That subparagraph provides that the court should not reduce attorneys' fees that "unreasonably exceed[ ] the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation," as it is required to by § 1415(e)(4)(F)(ii), if it finds that "the State or local educational agency unreasonably protracted the final resolution of the action or proceeding."

In 1988, the Kattans, asserting that the District had unreasonably protracted the litigation, moved for sanctions against the District under 20 U.S.C. § 1415(e)(4)(G), as well as under 28 U.S.C. § 1927 and Rule 11 of the Federal Rules of Civil Procedure. The Kattans argued in their supporting memoranda that the District's dilatory tactics warranted a greater fee award than that permitted under the HCPA's basic fee-shifting provision.

The Kattans contend that the district court neglected to consider their § 1415(e)(4)(G) claim. In its order of October 1, 1991, the district court expressly rejected the Kattans' motion for sanctions, stating that "[a]lthough defendants' conduct in this case was far from exemplary, it does not rise to the level of conduct necessary for the imposition of sanctions under Fed. R. Civ. P. 11 or 28 U.S.C. § 1927." Although the district court did not explicitly mention § 1415(e)(4)(G), it implicitly rejected the Kattans' claim under that provision as well, since the Kattans relied on all three provisions in the same motion. In any case, the court clearly made findings as to the blameworthiness of the District's conduct sufficient to reject the Kattans' § 1415(e)(4)(G) claim. We are in no position to second-guess the district court's judgment as to whether the District of Columbia's tactics were unreasonable enough to warrant the award of extra fees.

III. CONCLUSION

Because the District of Columbia did not contest Mr. Kattan's entitlement to attorney's fees in its original opposition to the Kattans' application for fees, we find that the District waived the issue and cannot raise it for the first time on appeal. We further hold that the district court was justified in setting Ms. Douglass' fees at $125 per hour. We therefore uphold the district court's fee award in all respects.

It is so ordered.

Circuit Judge D. H. GINSBURG, concurring in part and dissenting in part: The district court decided that *Kay v. Ehrler*, 111 S. Ct. 1435 (1991), in which the Supreme Court held that a *pro se* litigant is not entitled to an attorney's fee under 42 U.S.C. § 1988, does not bar the award of an attorney's fee to a *pro se* litigant under the Handicapped Children's Protection Act. The reason? Simply that "plaintiffs' motion for fees is based on the EHA, a different statutory scheme from that which formed the basis of the *Kay v. Ehrler* decision." *Kattan v. District of Columbia*, No. 88–0630 (D.D.C. December 11, 1991), slip op. at 3. This is the proverbial distinction without a difference.

The fee-shifting provision of the HCPA is practically identical to that of § 1988, and the Supreme Court has long required that similar fee-shifting provisions in federal statutes be interpreted in the same way. *See, e.g., Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989) ("We have stated that fee-shifting statutes' similar language is 'a strong indication' that they are to be interpreted alike"); *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983) (same standards for awarding attorney's fee apply under all statutes authorizing award of fee to a "prevailing party"); *Northcross v. Board of Education*, 412 U.S. 427, 428 (1973) (similarity in wording of two statutory fee-shifting provisions is a "strong indication that the two statutes should be interpreted *pari passu*").

The Court in *Kay v. Ehrler* also stated that "the word 'attorney' assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under § 1988." 111 S. Ct. at 1437. I see no reason to think that the word "attorney" in the fee-shifting provision of § 1988 has a different meaning than it has in the fee-shifting provision of the HCPA. The district court's cursory "analysis" surely offers none.

The district court's grant of a fee for the work performed by Mr. Kattan was clearly an error. The court, however, declines to reach the merits of that question, *see* Ct. Op. at 5, holding that "the District of Columbia waived the issue of Mr.

Kattan's eligibility for fees by not raising it in the district court in a timely manner." Ct. Op. at 8. I disagree.

The District of Columbia had no reason in 1988 to anticipate that the Supreme Court would in 1991 change the law of this circuit, which then authorized the district court to award an attorney's fee to a *pro se* litigant. On the contrary, the district court was clearly bound both by *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977), which held that a *pro se* lawyer was eligible for fees under the Freedom of Information Act, and by the Supreme Court's longstanding command that similarly-worded fee-shifting provisions are to be treated alike. The distinction the district court drew in *Lawrence v. Staats*, 585 F. Supp. 1375 (D.D.C. 1984), between the fee provision of the FOIA and that of § 1988 ran contrary to the Supreme Court's approach. *See Lawrence v. Bowsher*, 931 F.2d 1579, 1580 (D.C. Cir. 1991) (affirming "[s]olely" on the basis of intervening Supreme Court decision in *Kay v. Ehrler*, which overruled *Cuneo*). *But see* Ct. Op. at 7 (lauding the district court for "a well-reasoned opinion" in *Lawrence v. Staats*).

It is simply unreasonable to penalize the District of Columbia for failing to have argued a distinction (between the fee provision of the FOIA and that of the HCPA) that the district court would have been required to reject under Supreme Court and circuit precedent. By holding that the District waived the issue of Mr. Kattan's eligibility for fees, the court is in effect punishing a litigant for not making what would have been at the time an almost frivolous argument.

Finding no waiver of the District's objection, I respectfully dissent from the court's decision affirming the award of an attorney's fee to the *pro se* plaintiff.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 88-0630 (JHG)

SARAH KATTAN, *et al.*,
Plaintiffs,

v.

THE DISTRICT OF COLUMBIA, *et al.*,
Defendants.

MEMORANDUM OPINION

On August 9, 1988, the Court issued a Memorandum Opinion, 691 F. Supp. 1539 (D.D.C. 1988), granting plaintiffs relief under the Education for All Handicapped Children Act ("EHA"), 20 U.S.C. §§ 1400-61. Although the Court at that time noted that plaintiffs were entitled to attorneys' fees and costs pursuant to 20 U.S.C. § 1415(e)(4)(B), the amount of the fee awaited full briefing. Presently pending are plaintiffs' application for fees and costs and plaintiffs' renewed motion for sanctions. For the following reasons, plaintiffs shall be awarded attorneys' fees and costs in the amount of $90,488.83, and plaintiffs' renewed motion for sanctions is denied.

I. DISCUSSION

Pursuant to 20 U.S.C. §1415(e)(4)(B), "In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party."[1]

First, the Court must consider whether the applicants are prevailing parties. As the Supreme Court has suggested,

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[1] No bonus or multiplier may be used in calculating the fees awarded under this section. *See* 20 U.S.C. § 1415(e)(4)(C).

"[P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (citation omitted); *Medford v. District of Columbia*, 691 F. Supp. 1473, 1479 (D.D.C. 1988). In the instant case, it is clear that although plaintiffs were not awarded all of the requested relief, they have succeeded on a significant issue: Plaintiff, Sarah Kattan, was placed in Ivymount School at defendants' expense.

Next, the Court must next discern whether the requested fee is reasonable. In calculating the appropriate fee, the Court should consider the reasonable hourly rate of the lawyers, the adequacy of the documentation in support of the applicant's fee request, and the number of hours the lawyers reasonably expended. *See Hensley*, 461 U.S. at 433; *Holmes v. District of Columbia*, 680 F. Supp. 40, 44 (D.D.C. 1988). Defendants argue that plaintiffs' petition is deficient in all three respects.

In evaluating the reasonableness of the hourly rate, the Court may look to "the level of skill necessary, time limitations, the amount to be obtained in the litigation, the attorney's reputation, and the undesirability of the case." *Copeland v. Marshall*, 641 F.2d 880, 892 (D.C. Cir. 1980). Although plaintiffs[']counsel have requested $150 per hour for the work of Ms. Douglass and $125 per hour for Mr. Kattan's services, defendants maintain that plaintiffs[ ] are entitled to no more than $90 and $75 respectively for their services. The Court cannot accept either parties' position.

Although defendants suggest that the fees awarded in a similar litigation, *Stebbing v. District of Columbia*, No. 86-2549, slip. op. (Mar. 2, 1988), where the prevailing party was awarded $100 per hour for partner time and and $70 per hour for associate time, is controlling, the Court cannot agree. In *Stebbing*, the Court emphasized that the litigation was not very complicated. In fact, only a few pleadings had been filed in that case. On the other hand, plaintiffs have failed

to cite a single case in which the fee award was greater than $125 per hour.

It is clear that $125 per hour represents an appropriate rate for Ms. Douglass' services. Ms. Douglass has had more than thirteen years of experience, mostly in the area of civil litigation. In addition, she billed at $165 to $180 per hour before practicing law as a sole practitioner. And E. Joseph Kallas, a partner in the Law Firm Services Group of Price Waterhouse, who does consulting and survey work with several dozen Washington, D.C. firms, has suggested that a senior associate would bill within a range of $110 to $175 and that an attorney who has been a partner for three or more years would bill within a range of $135 to $250. Declaration of E. Joseph Kallas, Application, Exhibit E. Moreover, other analogous decisions in this circuit have awarded attorneys' fees of $125 for partner time.[2] In light of the relevant case law and the affidavits submitted by Ms. Douglass, the Court concludes that $125 per hour is the prevailing community rate for Ms. Douglass' services.

The prevailing community rate for Mr. Kattan is somewhat more difficult to determine. Plaintiffs contend that Mr. Kattan's services are worth $125 per hour while defendants maintain that he is only entitled to $75 per hour. The Court, again, cannot accept either party's position.

Although Mr. Kattan has no billing history to guide the Court in setting a reasonable hourly rate, plaintiffs have provided the Court with evidence of Mr. Kattan's impressive educational and legal background to substantiate plaintiffs' fee request of $125 per hour.[3] In addition, according to Mr.

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[2] *See, e.g., Moore v. District of Columbia*, 674 F. Supp. 901 (D.D.C. 1987).

[3] Mr. Kattan graduated *cum laude* from the Northwestern University School of Law in 1976. He served as a Bigelow Teaching Fellow and Instructor at the University of Chicago Law School until 1977. From 1977 to 1978 he was a Fellow in Public Policy Studies at the Committee on Public Policy Studies at the University of Chicago. From 1978 to 1984, Mr. Kattan worked at the Office of Hearings and Appeals of the United States Department of Energy, serving as Assistant Director from 1980

[Footnote continued on the next page]

Kattan's current job performance, he received an "outstanding" overall performance evaluation as a Senior Antitrust Attorney at the FTC. Finally, Mr. Kattan was the sole counsel prior to April 22, 1988, and he was the sole author of plaintiffs' pleadings prior to that date.[4]

Although Mr. Kattan's increased participation necessitates a higher fee award than the typical $75 per hour "associate counsel" rate, Mr. Kattan's activities do not merit the $125 per hour rate requested. The Court has evaluated $125 per hour to Ms. Douglass as reasonable hourly compensation, and plaintiffs have admitted that Mr. Kattan's role was subordinate to Ms. Douglass. Accordingly, based on Mr. Kattan's declaration and the supporting affidavits, the reasonable hourly rate for his services is evaluated at $100 per hour, this rate reflecting the prevailing community standard for similar work.

Defendants next challenge both the documentation of the hours claimed in plaintiffs' application and plaintiffs' billing judgment in preparing the application.

Defendants' contention that plaintiffs' application is not properly documented is wholly without merit. As required, plaintiffs[ ] have submitted time records that reveal the amount of time expended, a short description of how that time was utilized, the date of the work, and the name of the attorney responsible for the services. *See Moore*, 674 F. Supp. at 904-05. Furthermore, these records were prepared contemporaneously and were totalled daily.

It is not as obvious, however, that plaintiffs have excluded from the fee calculation "hours that were not 'reasonably

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[Footnote continued from the previous page]
to 1984. Since 1984, he has been employed at the Federal Trade Commission ("FTC"), and is currently a senior antitrust attorney in the Planning Office of the Bureau of Competition of the FTC. *See* Declaration of Joseph Kattan Pursuant To 28 U.S.C. § 1746 ("Kattan Decl."), Application, Exhibit B, at ¶ 12.

[4] These pleadings included plaintiffs' complaint; plaintiffs' motion for a preliminary injunction; plaintiffs' first set of requests for interrogatories and document production; and plaintiffs' application for permanent injunction. *See* Kattan Decl., at ¶ 7.

expended.' " *See Hensley*, 461 U.S. at 433-34 (citation omitted). Specifically, the Court cannot conclude that the hours expended in pursuing plaintiffs' renewed motion for sanctions represents a legitimate cost. Although defendants' conduct in this case was far from exemplary, it does not rise to the level of conduct necessary for the imposition of sanctions under Fed. R. Civ. P. 11 or 28 U.S.C. § 1927. Thus, plaintiffs' renewed motion for sanctions is denied, and plaintiffs' hours, and requested compensation, shall be reduced by the amount of time expended in pursuit of sanctions. This results in a reduction of 14.5 hours for Ms. Douglass and 32 hours for Mr. Kattan.[5]

For all hours other than those spent in conjunction with plaintiffs' work on motions for sanctions, the Court is satisfied that plaintiffs have exercised reasonable billing judgment and have claimed only "reasonable hours." Plaintiffs[ ] have provided the Court with detailed documentation of their billing judgment and have cited the numerous hours omitted from the fee application. Moreover, although defendants have raised several objections in response, their objections consist of arbitrary, conclusory assertions regarding the amount of time that plaintiffs "should have spent" on certain documents and litigation tasks. And it is "neither practical nor desirable to expect the trial court judge to [review] each paper in this massive case file to decide, for example, whether a particular motion could have been done in 9.6 hours instead of 14.3 hours." *Copeland*, 641 F.2d at 903. Accordingly, the total number of hours reasonably exercised by the plaintiffs' counsel are 304 hours for Ms. Douglass and 430.5 hours for Mr. Kattan, and the lodestar amounts are $38,000 for Ms. Douglass and $43,050 for Mr. Kattan.

In addition to the lodestar amounts detailed above, plaintiffs also seek reimbursement of $6,346.83 in costs paid

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[5] These figures represent the best efforts of the Court to determine the amount of time spent on plaintiffs' original motion for sanctions, voluntarily withdrawn by plaintiffs without prejudice on April 15, 1988, as well as the amount of time spent on plaintiffs' renewed motion for sanctions.

by Ms. Douglass and $3,092 in costs paid by Mr. Kattan, including *inter alia*, expert witness fees, postage fees, copying fees, messenger fees, transportation fees, and court reporter fees. It is clear that plaintiffs are entitled to all expenses associated with the litigation.

Defendants concede that plaintiffs are entitled to $3,092 of costs to Mr. Kattan, and this sum is indeed a reasonable expense of litigation "that they would normally expect to pass on to fee paying clients." *McKenzie v. Kennickell*, 645 F. Supp. 437, 452 (D.D.C. 1986) (citation omitted). As for the remaining costs, however, defendants contend that $1,264 is unwarranted. Specifically, defendants object to the expert witness fee to Price Waterhouse for the Declaration of E. Joseph Kallas.

Although defendants label this expenditure "unnecessary and excessive," the expenditure is reasonable in light of plaintiffs' burden of proof regarding "prevailing community rate" in the attorneys' fees request. *See Blum v. Stenson*, 465 U.S. 886 (1984). Moreover, this expense also would, in the usual course, be passed on to the fee paying client, and thus, Ms. Douglass is entitled to full reimbursement for her costs.

II. CONCLUSION

For the reasons set forth above, it is hereby

ORDERED that plaintiffs' application for attorneys fees is granted in the total amount of $90,488.83; and it is

FURTHER ORDERED that plaintiffs' renewed motion for sanctions is denied.

A separate judgment accompanies this memorandum.

IT SO ORDERED.

OCTOBER 16, 1991.

/s/ Joyce Hens Green

JOYCE HENS GREEN
United States District Judge

[FILED: OCTOBER 17, 1991]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 88-0630 (JHG)

SARAH KATTAN, *et al.*,
Plaintiffs,

v.

THE DISTRICT OF COLUMBIA, *et al.*,
Defendants.

JUDGMENT

In accordance with the Memorandum Opinion issued this date, judgment is entered in favor of plaintiffs and against defendants in the amount of ninety thousand, four hundred, eighty-eight dollars and eighty-three cents ($90,488.83).

IT IS SO ORDERED.

OCTOBER 16, 1991.

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

[FILED: OCTOBER 17, 1991]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 88-0630 (JHG)

SARAH KATTAN, *et al.*,
Plaintiffs,

v.

THE DISTRICT OF COLUMBIA, *et al.*,
Defendants.

ORDER

On August 9, 1988, the Court issued a Memorandum Opinion, 691 F. Supp. 1539 (D.D.C. 1988), granting plaintiffs relief under the Education for All Handicapped Children Act ("EHA"), 20 U.S.C. §§ 1400-61. On October 16, 1991, the Court issued another Memorandum Opinion, granting plaintiffs' application for attorneys' fees in the total amount of $90,488.83.

Presently pending are plaintiffs' motion to correct clerical mistake and defendants' motion to alter or amend the October 16, 1991 decision. For the following reasons, plaintiffs' motion is granted in part, and defendants' motion is denied.

In defendants' motion for reconsideration, they urge the Court to extend the rationale and application of *Kay v. Ehrler*, 111 S. Ct. 1435 (1991) to the instant case. In *Kay v. Ehrler*, an attorney who had been denied a place on the ballot for the Democratic presidential primary in Kentucky brought an action seeking to declare unconstitutional the Kentucky statute upon which the denial had been based. He initially appeared *pro se*, but later hired an attorney to represent him. After mounting a successful constitutional challenge, he applied for attorneys' fees under 42 U.S.C. § 1988. The Supreme Court upheld the District Court's decision to award fees only to plaintiff's retained counsel,

reasoning that denying the petitioner attorney's fees for his *pro se* representation would create an incentive for civil rights victims to retain counsel in subsequent cases.

The Court cannot agree with defendants that the analysis of *Kay v. Ehrler* should be applied to the instant case. First, in defendants' original opposition to plaintiffs' motion for fees and costs, they conceded that attorneys' fees were available under 20 U.S.C. §1415(e). In addition, they agreed that plaintiffs were entitled to an award of fees and costs. In fact, they had indicated their willingness to explore settlement of plaintiffs' application. Nowhere in their opposition did defendants argue that Mr. Kattan should recover nothing because he was representing himself. Rather, defendants only disputed the hourly rates requested and the total number of hours expended.

It is well settled that a motion to amend judgment is not to be used to raise new arguments that could, and should have been raised before judgment. Thus, it appears that defendants have waived the argument they now advance by failing to raise it at the appropriate time.[1]

In any event, plaintiffs' motion for fees is based on the EHA, a different statutory scheme from that which formed the basis of the *Kay v. Ehrler* decision. And defendants have not cited any legislative history or caselaw that supports defendants' argument to extend the ambit of *Kay v. Ehrler* to EHA cases. Consequently, defendants' motion to alter or amend the judgment must be denied.

Plaintiffs also request that the Court amend its judgment of October 16, 1991 to correct a clerical error. Specifically plaintiffs contend that the Court overlooked plaintiffs' request for additional fees and costs incurred by Ms.

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[1] Although defendants further argue that their Rule 59 motion is based on a change of law not reasonably anticipated by the defendants, this District had ruled in 1984 that attorneys representing themselves are not entitled to attorneys' fees under 42 U.S.C. § 1988. *See Lawrence v. Staats*, 586 F. Supp. 1375, 1378-80 (D.D.C. 1984), *aff'd in relevant part*, 931 F.2d 1579 (D.C. Cir. 1991).

Douglass in preparing a reply to defendants' opposition toplaintiffs' application for fees, which reply was filed on November 7, 1988.[2]

The Court intended to compensate plaintiffs for their fees reasonably expended and costs incurred in preparing plaintiffs' application and reply. However, as plaintiffs correctly point out, the Court did not intend to compensate plaintiffs for the time expended in preparing their renewed motion for sanctions. Accordingly, plaintiffs shall be entitled to additional compensation for 13.75 hours, totalling $1,718.75, and $192.48 for additional costs.

Accordingly, for the reasons expressed herein, it is hereby

ORDERED that defendants' motion to alter or amend judgment is denied; it is

FURTHER ORDERED that plaintiffs' motion to correct clerical mistake is granted in part; and it is

FURTHER ORDERED that plaintiffs' application for attorneys' fees shall be granted in the total amount of $92,400.06.

An amended judgment, intended to supercede the judgment entered on October 30, 1991, accompanies this Opinion.

IT IS SO ORDERED.

DECEMBER 11, 1991.

/s/ Joyce Hens Green

JOYCE HENS GREEN
United States District Judge

[2] Plaintiffs' additional request for fees is noted at footnote 1 on page 1 of Plaintiffs' Reply Memorandum in Support of Renewed Motion for Sanctions.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 88-0630 (JHG)

SARAH KATTAN, *et al.*,
Plaintiffs,

v.

THE DISTRICT OF COLUMBIA, *et al.*,
Defendants.

AMENDED JUDGMENT

In accordance with the Order issued this date, judgment is entered in favor of plaintiffs and against defendants in the amount of ninety-two thousand, four hundred dollars and six cents ($92,400.06).

IT IS SO ORDERED.

DECEMBER 11, 1991.

/s/ Joyce Hens Green

JOYCE HENS GREEN
United States District Judge

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1993

No. 92-7011

SARAH KATTAN, BY HER PARENTS
AND NEXT FRIENDS SUSAN J. THOMAS
AND JOSEPH KATTAN, *et al.*

v.

DISTRICT OF COLUMBIA,
A MUNICIPAL CORPORATION, *et al.*,
Appellants

AND CONSOLIDATED CASE NO. 92-7012

Before: MIKVA, *Chief Judge;* D. H. GINSBURG AND SENTELLE, *Circuit Judges.*

ORDER

Upon consideration of the petition for rehearing of the District of Columbia, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
For The Court:

RON GARVIN, *Clerk*

/s/ BY: Linda Jones for
ROBERT A. BONNER
Deputy Clerk

Circuit Judge D. H. Ginsburg would grant the Petition for Rehearing.

FILED: OCTOBER 6, 1993

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1993

No. 92-7011

SARAH KATTAN, BY HER PARENTS AND NEXT FRIENDS SUSAN J. THOMAS AND JOSEPH KATTAN, *et al.*

v.

DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION, *et al.*, *Appellants*

AND CONSOLIDATED CASE NO. 92-7012

Before: MIKVA, *Chief Judge;* WALD, EDWARDS, SILBERMAN, BUCKLEY, WILLIAMS, D. H. GINSBURG, SENTELLE, HENDERSON, AND RANDOLPH, *Circuit Judges.*

ORDER

The Suggestion For Rehearing *En Banc* of the District of Columbia has been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
For The Court:

RON GARVIN, *Clerk*

/s/ BY: Linda Jones for
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Williams would grant the suggestion.

FILED: OCTOBER 6, 1993

Supreme Court of the United States

No. A-433

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

SARAH KATTAN, ETC., *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including February 3, 1994.

/s/ William H. Rehnquist
Chief Justice of the United States

DATED THIS 23RD DAY OF NOVEMBER, 1993.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1993

No. 92-7011

SARAH KATTAN, BY HER PARENTS AND NEXT FRIENDS SUSAN J. THOMAS AND JOSEPH KATTAN, *et al.*

v.

DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION, *et al.*, *Appellants*

AND CONSOLIDATED CASE NO. 92-7012

Before: MIKVA, *Chief Judge;* D. H. GINSBURG AND SENTELLE, *Circuit Judges.*

ORDER

Upon consideration of appellants' motion to clarify and to vacate, it is

ORDERED, on the court's own motion, that the District of Columbia submit a supplemental memorandum of no more than five pages setting forth any argument that it was unable to make in its petition for rehearing/suggestion for rehearing *en banc* because it did not receive the court's June 30, 1993, order. The supplemental memorandum shall be filed on or before December 16, 1993.

Per Curiam
For the Court:

RON GARVIN, *Clerk*

/s/ BY: Linda Jones

LINDA JONES
Deputy Clerk

FILED: DECEMBER 9, 1993

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1993

USDC CV 88-0630

No. 92-7011

SARAH KATTAN, BY HER PARENTS
AND NEXT FRIENDS SUSAN J. THOMAS
AND JOSEPH KATTAN, *et al.*

v.

DISTRICT OF COLUMBIA,
A MUNICIPAL CORPORATION, *et al.*,
Appellants

AND CONSOLIDATED CASE NO. 92-7012

Before: MIKVA, *Chief Judge;* GINSBURG AND SENTELLE, *Circuit Judges.*

ORDER

Upon consideration of appellants' Motion to Clarify and to Vacate, filed November 22, 1993, and appellants' supplemental memorandum filed on December 14, 1993, it is

ORDERED, by the Court, that the motion is denied.

Per Curiam
For The Court:

RON GARVIN, *Clerk*

/s/ BY: Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

FILED: DECEMBER 21, 1993

Excerpts From
GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 92-7011

DATE	FILINGS—PROCEEDINGS
(cb)06-15-93	Opinion for the Court filed by Chief Judge Mikva. Circuit Judge D.H. Ginsburg concurring and dissenting in part.
(cb)06-15-93	Judgment for the Court that the judgment of the district court is hereby affirmed, in accordance with the opinion for the Court filed herein this date.
(cb)06-15-93	Order delaying mandate.
(W)06/29/93	5-Appellee/Cross-Appellant's bill of cost (m-29) [9].
(H)07/08/93	20-Appellee/Cross-Appellant's (D.C.) petition for rehearing and suggestion for rehearing *En Banc* (m-08) [1].
(H)07/12/93	5-Appellant/Cross-appellee's (D.C.) response to Bill of Costs (m-12) [9].
(H)10/06/93	Per curiam Order that the petition for rehearing filed by the District of Columbia is denied. (Mikva, Chief Judge; D.H. Ginsburg and Sentelle, Circuit Judges. (Circuit Judge Ginsburg would grant the petition for rehearing).
(H)10/06/93	Per Curiam Order En Banc that the suggestion for rehearing En Banc of the District of Columbia is denied. (Circuit Judge Williams would grant the suggestion).

DATE	FILINGS—PROCEEDINGS
(W)11/22/93	5-Appellant's motion to clarify and to vacate (m-22) [1].
(W)12/02/93	5-Appellee's response to motion to clarify and to vacate and alternate suggestions as to appropriate procedures (m-02) [1].
(N)12/09/93	Per Curiam Order to clarify and vacate, it is ORDERED on the court's own motion that DC submit a supplemental memorandum of no more than 5 pages setting forth any argument that it was unable to make in its petition for rehearing/suggestion for rehearing en banc because it did not receive the court's 6/30/93 order. Before: Mikva, Chief Judge; D.H. Ginsburg and Sentelle, Circuit Judges. SEE ORDER FOR DETAILS.

Supreme Court, U.S.
FILED
MAR 16 1994
OFFICE OF THE CLERK

No. 93-1296

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DISTRICT OF COLUMBIA, *et al.*,

Petitioners,

v.

SARAH KATTAN, BY HER PARENTS AND NEXT FRIENDS, SUSAN J. THOMAS AND JOSEPH KATTAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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March 16, 1994

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Must a court of appeals reverse a district court's exercise of its discretionary power to award attorneys' fees where the district court found that the defendants below waived any objection to the fees based on the *pro se* nature of the representation by ignoring judicial authority in that same court supporting such an objection and by failing to object to the award on such grounds before judgment?

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No. 93-1296

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DISTRICT OF COLUMBIA, *et al.*,

Petitioners,

v.

SARAH KATTAN, BY HER PARENTS AND NEXT FRIENDS, SUSAN J. THOMAS AND JOSEPH KATTAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS SARAH KATTAN *ET AL.* IN OPPOSITION

Respondents Sarah Kattan and her parents Susan J. Thomas and Joseph Kattan respectfully request that this Court deny the petition for a writ of certiorari seeking review of a decision of the United States Court of Appeals for the D.C. Circuit.

STATEMENT OF THE CASE

At trial of this case in 1988, Sarah Kattan was a five-year old girl suffering from multiple disabilities. Petitioners, the District of Columbia and its officials, had evaluated Sarah and selected an educational program for her which they represented would meet her needs. Her parents unsuccessfully challenged the appropriateness of the placement at an administrative hearing, and then brought suit in the district court as parents and next friends of Sarah pursuant to 20 U.S.C. §1415(e).[1] Mr. Kattan and Ms. Thomas were also Plaintiffs in the district court action in their individual capacities as the beneficiaries of various procedural rights provided by the EHA.[2]

At the administrative stages of the case and in the early weeks of the district court action, Mr. Kattan – at the time an attorney with the U.S. Federal Trade Commission – represented the Plaintiffs. At the suggestion of

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[1] The Education for All Handicapped Children Act, 20 U.S.C. §1400 *et seq.* ("EHA"), required each state and local public school district receiving federal funds to provide all children with a free education "appropriate" to their needs. 20 U.S.C. §1412. *District Bd. of Educ. v. Rowley*, 459 U.S. 176, 188-89 (1982).

The EHA has been renamed the Individuals with Disabilities Education Act. See Petition at N.1. For simplicity and for consistency with the decisions below, in this Opposition we continue to refer to the statute as EHA.

[2] The parents of a handicapped child have the right to an impartial administrative hearing to test the appropriateness of their child's placement. 20 U.S.C. §1415(b)(1)(E) and (2). And if the child prevails in a district court action challenging the placement, the district court is given discretion to award reasonable attorneys' fee to that child's parents. 20 U.S.C. §1415(e)(4)(B).

The EHA thus creates a substantive right to an appropriate education that runs to the handicapped child and certain procedural protections to ensure the availability of that right that run to the parents.

the district court, he subsequently associated co-counsel, and he and co-counsel jointly brought the case to judgment on the merits. The district court's decision on the merits, dated August 9, 1988, included a holding that the Plaintiffs' "request for reasonable attorneys' fees and costs associated with the action will be granted[3] in an amount to be determined through subsequent filings, as necessary."[4] Plaintiffs' "attorneys" were, of course, none other than Mr. Kattan and his co-counsel. No appeal was taken from this decision.

When the Kattans submitted their fee application, Petitioners attacked it on multiple grounds, arguing at length why the amounts sought were excessive. Petitioners

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[3] 20 U.S.C. §1415(e)(4)(B) provides, in relevant part, that in a civil action to enforce the EHA brought under §1415, "the court, *in its discretion*, may award reasonable attorneys' fees as part of the costs to the parents . . . of a handicapped child or youth who is the prevailing party." (emphasis added)

[4] *Kattan by Thomas v. D.C.*, 691 F. Supp. 1539, 1547, 1548 (D.D.C. 1988). This decision on the merits is important to a meaningful consideration of this Petition for Certiorari. The district court granted extensive relief to the Kattans under the EHA, and made it clear that the Defendants below, Petitioners here, forced the Plaintiffs to prove a negative – that the District of Columbia could not and would not provide Sarah with an appropriate educational program – in the face of overwhelming evidence that Defendants well knew that there was in fact no program such as that promised to Sarah in place in the District of Columbia and that hundreds of other children needing identical services were not receiving them.

The vigor with which Petitioners defended the merits of the case below was presented to the Court of Appeals for its consideration as relevant to its review of the district court's discretionary rulings and as relevant to its consideration of whether "justice under the circumstances" required reversal under that Court's discretionary authority arising from 28 U.S.C. §2106. This Court too is being asked to afford "justice under the circumstances," and should be mindful of the context described above.

claimed that the hourly rates for Mr. Kattan and for his co-counsel were too high, argued that the bills submitted were insufficiently detailed and lacked supporting documentation, contended that the hours spent by both lawyers were disproportionate to the relief sought and obtained, and attacked as "excessive" Plaintiffs' use of an expert witness on the question of the prevailing rate for comparable legal services. Yet despite their aggressive approach to the issue of counsel fees, Petitioners explicitly conceded that Mr. Kattan should be compensated for time he spent as a lawyer on this case, albeit for less hours and at a lower rate than requested.[5] Nowhere did Petitioners argue that Mr. Kattan should be entitled to no compensation whatsoever for his legal services because he was allegedly representing himself.

At the time of Petitioners' opposition to the fee application, there was no case in any court that had addressed the question whether attorney parents representing their children in EHA cases are entitled to fees for their legal services.[6] As to fees for *pro se* representation under other fee-shifting statutes, this Court had yet to address the issue. The D.C. Circuit had held that fees were available to *pro se* litigants under FOIA, *Cuneo v. Rumsfeld,* 553 F.2d 1360, 1366 (D.C. Cir. 1977), but in so holding cited cases from other jurisdictions coming down on both sides of the issue, and commented as follows:

> "The law is not clear on the question of whether a party appearing on his own behalf, who is also an attorney, is entitled to tax attorney fees as costs."

553 F.2d 1366 & n.18.

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[5] *See* Joint Appendix in Nos. 92-7011 and 92-7012, in the Court of Appeals for the D.C. Circuit at 121.

[6] Respondents are aware of no such decision today.

Petitioners must have been aware that such an argument was available to them, for in their fee application the Kattans explicitly cited *Cuneo* and raised the issue of *pro se* representation.[7] Moreover, the District Court for the District of Columbia – the very Court in which the application was pending – had held in 1984 that *pro se* attorneys were ineligible for fee awards under 42 U.S.C. §1988. *Lawrence v. Staats*, 586 F. Supp. 1375, 1378-80 (D.D.C. 1984), *affirmed sub nom Lawrence v. Bowsher*, 931 F.2d 1579 (D.C. Cir. 1991). In that decision, the court distinguished the *Cuneo* case because of policy matters specific to FOIA and cited at least seven cases from other jurisdictions (including cases from five federal circuits) that had concluded that fees were not available to *pro se* litigants under 42 U.S.C. §1988.

The district court inexplicably failed to act on the Kattans' fee application for nearly three years, but finally issued an opinion and a final judgment granting the application in part on October 16, 1991. App. 26a-31a. Included in that award were fees for legal services performed by Mr. Kattan.

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[7] In footnote 33 to their fee application, Respondents had stated:

> . . . A few cases discuss the question whether an attorney should receive attorney's fees at all when he appears *pro se*. *See, e.g., Cuneo v. Rumsfeld*, 553 F.2d 1360, 1366 (D.C. Cir. 1977) (under the attorneys' fees provision of the Freedom of Information Act, a plaintiff appearing on his own behalf who is also an attorney should not be denied those fees simply because he is an attorney and has not incurred liability to pay those fees). Mr. Kattan has not been appearing here *pro se*; he is a named plaintiff only in the role of parent and "next friend" to his minor daughter, who cannot bring suit in her own name.

Petitioners thereupon moved to alter or amend the judgment in reliance on Rule 59(e) of the Federal Rules of Civil Procedure, arguing that this Court's decision in *Kay v. Ehrler*, 111 S.Ct. 1435 (1991), which had issued six months before the district court's judgment on attorneys' fees, constituted an intervening change in law which mandated that Mr. Kattan receive no fees whatsoever for his services. Petitioners had taken no steps to call the *Ehrler* decision to the district court's attention during the six months prior to entry of the fee award.

The district court denied Defendant's Rule 59(e) motion, holding that Petitioners had waived any argument that Mr. Kattan was ineligible for fees because he was representing himself by failing to raise it at the appropriate time. App. 33a-35a. In making its finding of waiver, that court relied on Petitioners' concessions as to Mr. Kattan's entitlement to fees. It also relied on Petitioners' failure to argue the rule of *Lawrence v. Staats, supra,* in declining to hold that this Court's decision in *Kay v. Ehrler* constituted a change of law not reasonably anticipated so as to relieve Petitioners of the effect of their waiver. App. 34a.[8]

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[8] In addition, the district court pointed out that Petitioners had failed to present it with reasons to extend *Kay v. Ehrler*, which was a case arising under 42 U.S.C. §1988, to an action under the EHA. App. 34a. The Kattans had argued to the district court that *Kay v. Ehrler* need not control an EHA case because the EHA's unique statutory scheme, under which a parent must be named a plaintiff in order to receive procedural rights that are in fact for the benefit of the co-plaintiff minor child, requires a parent attorney to represent "himself" in order to represent his child. The Kattans also argued that the *Ehrler* case would not foreclose fees for Mr. Kattan for work performed under the supervision of co-counsel. Both distinctions considerably weakened application of the reason behind the rule of *Ehrler* – to encourage the retention of independent counsel.

The court of appeals affirmed the district court's finding of waiver, and also held that the district court did not abuse its discretion in denying Petitioners' attempt to raise the *pro se* objection for the first time after judgment by motion under Rule 59(e). App. 4a-6a.[9] The court of appeals also declined to exercise its discre ionary power under 28 U.S.C. §2106 to reverse the district court so as to bring the judgment in this case into conformity with *Kay v. Ehrler,* reasoning that the decision in *Kay v. Ehrler* did not state a new legal principle that was previously unavailable to Petitioners for practical purposes, and holding that no exceptional circumstances existed in this case to make it just to relieve Petitioners from their waiver. App. 7a-8a.[10]

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioners seek to elevate a simple case of waiver and exercise of discretion into an issue of public importance worthy of this Court's exercise of its limited review resources. Petitioners attempt to do so first by framing the Question Presented in argumentative terms, thereby ignoring the finding of both courts below as well as matters of public record. Next, Petitioners fail to acknowledge the discretionary nature of the decisions for which

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[9] Contrary to Petitioners' assertion (Petition at 9), the docket of the Court of Appeals for the D.C. Circuit in this case shows that its decision of June 15, 1993 in Nos. 92-7011 and 92-7012 was amended on June 30, 1993.

[10] The Court of Appeals explicitly declined to decide whether the *Ehrler* decision should control this EHA case. App. 4a. If the Petition is granted, these issues would have to be decided in this Court's review. *Compare, Fogerty v. Fantasy, Inc.*, 62 U.S.L.W. 4153 (March 1, 1994) (the goals and objectives of the governing statute may require different exercise of discretion under fee-shifting statutes with identical language).

they seek review and ignore the limited review available for matters so committed. Petitioners also suggest non-existent conflicts between the circuit courts and/or the decisions of this Court, and assert fanciful burdens on the administration of justice that they claim will materialize if this Court declines to intervene. Closer scrutiny reveals the flaws in Petitioners' reasoning and leads to a conclusion that issuance of a writ is inappropriate in this case.

I.
THE DECISION BELOW DOES NOT RAISE THE QUESTION PRESENTED BY PETITIONERS.

Petitioners ask this Court to make one central assumption in accepting this case for review – that they, as Defendants below, were "foreclosed by the law of the Circuit" from advancing, as a defense to the Kattans' application for attorneys' fees, that Mr. Kattan should be ineligible to receive compensation for legal services because he represnted himself.

This one assumption is central to Petitioners' entire argument, as they repeatedly urge the Court that the decision of the District of Columbia Circuit in the case of *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977), based on the attorney fee provision of the Freedom of Information Act, resolved beyond question that an attorney representing his child, wife and himself was eligible to receive fees for legal services under the attorney fee provision of the EHA. *See* Petition at Question Presented 3, 7, 10-12, 19-21.

In fact, the reasoning of *Cuneo* rests on policy considerations unique to FOIA and the very language of *Cuneo* concedes that the law is not clear as to *pro se* fee awards under other fee-shifting statutes. In addition, *the very*

court in which Petitioners were litigating had held in 1984 (well after *Cuneo*) that attorneys representing themselves were not entitled to attorneys' fees under 42 U.S.C. §1988. *Lawrence v. Staats,* 586 F. Supp. 1375, 1378-80 (D.D.C. 1984), *aff'd sub nom. Lawrence v. Bowsher,* 931 F.2d 1579 (D.C. Cir. 1991). Thus, to the extent a decision under 42 U.S.C. §1988 should be seen to control a decision under the attorney fee provision of the EHA (which in asserting the controlling force of *Kay v. Ehrler* Petitioners contend), the court of appeals correctly held in this case that it was not at all clear in 1988, when Petitioners opposed the Kattans' fee application before the district court with multiple grounds of defense, whether *pro se* attorneys were eligible for fees under EHA, and whether all fee-shifting statutes would be treated alike. As the district court opinion in *Lawrence v. Staats* makes clear, quite a number of other courts had similarly concluded by 1984 that *pro se* litigants were ineligible for attorneys fees under 42 U.S.C. §1988 and other fee-shifting statutes. *Lawrence v. Staats,* 586 F. Supp. 1375, 1378-79 (1984). Moreover, as of the date of Petitioners' opposition to the Kattans' fee application in the district court, a number of commentators had written on the subject of attorneys' fees for *pro se* representation in civil rights cases, each citing rulings rejecting such fees. Comment, *Pro Se Can You Sue?: Attorney Fees for Pro Se Litigants,* 34 Stanford Law Rev. 659 (1982); Comment, *Awarding Fees to the Self-Represented Attorney Under the Freedom of Information Act,* 53 George Washington L. Rev. 291 (1984-85); Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem,* 1986 Duke L.J. 435, 456 (1986); Annot.: Award of Attorneys' Fees to Pro Se Litigant Under 42 U.S.C. §1988, 82 ALR Fed 800 (1987).

Petitioners asked the court of appeals and now ask this Court to determine as an underlying predicate to the question presented that they were "foreclosed" as a practical matter from raising the *pro se* issue in 1988 due to a fear of sanctions under Rule 11. Yet is is ludicrous to fear sanctions when the court of appeals in your circuit has stated that "the law is not clear" and when a party can cite as authority for advancing an argument a published decision by another judge of the very court to whom the argument is addressed[11] or district court or circuit court decisions from other circuits.[12] It is also ludicrous to fear sanctions in responding to an argument first raised by your opponent. Here, the Kattans flagged the *pro se* issue in their fee petition, alerting a reasonable party to it. Defendants were plainly entitled to respond to the Kattans' argument without fear of sanctions.

After this Court's decision in *Kay v. Ehrler* on April 16, 1991, Petitioners took no step to bring that decision to the district court's attention, even though the Kattans' fee application was still under submission and would remain so for another six months. Petitioners cannot argue that they were unaware that the application was still pending or that calling the court's attention to an allegedly relevant intervening Supreme Court decision is a common and appropriate practice. Surely Petitioners

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[11] *Staats* was apparently on appeal in 1988; no order from the Court of Appeals reversed *Staats* based on *Cuneo*. For this reason alone Petitioners' asserted fear of sanctions for citing the *Staats* opinion rings empty.

[12] At least eleven circuit court decisions denying attorneys' fees to litigants representing themselves were readily discoverable in 1988. *See*, Annot.: Award of Attorneys' Fees to Pro Se Litigants Under 42 U.S.C. § 1988, 82 ALR Fed 800, 804-08 (1987).

can not ask this Court to conclude that they were "foreclosed" from taking this step to supplement their pending opposition. Petitioners' failure to act during this six month period alone renders the Question Presented to this Court misleading and review on this basis inappropriate.

II.
THE PETITION REQUESTS REVIEW OF MATTERS LEFT TO THE DISTRICT COURT'S DISCRETION.

In the decision for which review is sought, the D.C. Circuit affirmed the district court's exercise of its discretion[13] to award counsel fees in the face of its finding of a waiver of an available defense to such fees. The court of appeals also upheld the district court's exercise of its discretion to decline to consider such a waived defense in the context of a motion under Rule 59(e), filed after entry of judgment and six months after publication of the decision which Petitioners contend to be an intervening change in law. The discretionary nature of a district court's decision under Rule 59(e) and the limited scope of appellate review thereof is widely recognized.[14]

Both of the discretionary decisions which Petitioners ask this Court to review were made in the context of a

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[13]This Court has very recently confirmed that the decision of whether or not to award fees is one committed to the sound discretion of the trial judge under fee shifting statutes providing that the district court "may" award fees. *Fogerty v. Fantasy, Inc.*, 62 U.S.L.W. 4153, 4158 (March 1, 1994).

[14]*See, e.g., Mariani-Giron v. Acevedo-Ruiz*, 945 F.2d 1, 3 (1st Cir. 1991); *Temkin v. Frederick County Commr's*, 945 F.2d 716, 724-25 (4th Cir. 1991); *Floyd v. Laws*, 929 F.2d 1390, 1400 (9th Cir. 1991); *Billups v. Methodist Hosp. of Chicago*, 922 F.2d 1300, 1305 (7th Cir. 1991); *Youmans v. Simon*, 791 F.2d 341, 349 (5th Cir. 1986).

case where defendants below had tenaciously attempted to defend an untenable position, to prevent a disabled child from receiving therapy that everyone conceded she needed and was due. See *Kattan by Thomas v. D.C.*, 691 F. Supp. 1539, 1542-45 (D.D.C. 1988). The court of appeals wisely found no abuse of discretion by the judge who was present to observe Petitioners' conduct of the proceedings below. We respectfully suggest that the court of appeals' respect for the trial court's decision should be afforded great weight by this Court.

III.

THE COURT OF APPEALS PROPERLY DECLINED TO EXERCISE ITS DISCRETIONARY POWER UNDER 28 U.S.C. §2106 TO AFFORD RELIEF TO PETITIONERS, BECAUSE JUSTICE UNDER THE CIRCUMSTANCES WOULD NOT BE SERVED THEREBY.

The court of appeals declined to exercise its own discretion under 28 U.S.C. §2106 to add this case to the short list of cases in which courts of appeal consider arguments not advanced to the lower courts or apply outcome-determinative changes of law which should not reasonably have been foreseen by the parties to cases developed under earlier law.[15] That statute, which creates a narrow exception to the usual rule that an appellate court only considers matters that have been raised in the court below, is sparingly used in exceptional circumstances, and then only to prevent clearly inequitable results or to avoid deprivation of newly emerging

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[15] The case of *United States Nat'l Bank of Oregon v. Independent Ins. Agents*, 113 S.Ct. 2173, 2177-79 (1993), cited by Petitioners (Petition at 13), holds that a court of appeals has *discretion* to overlook a waiver. It does not hold that that discretion must be exercised to do so.

constitutional doctrines.[16] The statute is not designed to afford a defeated party another day in court because he thinks that if he were given the opportunity to try his case again on another theory he might prevail. It should not be available to a party who has waived an obvious issue below after having been put on notice of the issue by the opposing party, as happened here.

In any event, this is not a case that can seriously be argued to be one in which injustice will result from affirmance of the district court's award of fees to Mr. Kattan. The court of appeals was fully briefed on Petitioners' performance in the court below,[17] and properly exercised its discretion to do justice in this case. We respectfully suggest that this Court should give due deference to its decision.

IV.

THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY OTHER COURT OF APPEALS ON THE SAME MATTER.

Petitioners assert that the court of appeals' decision conflicts both with decisions of this Court and with those of other circuits. Both assertions are wrong.

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[16] *See*, Annot.: When Will Federal Court of Appeals Review Issue Raised By Party for First Time on Appeal Where Legal Developments After Trial Affect Issue, 76 ALR Fed 522 (1986).

[17] Brief for Sarah Kattan *et al.*, filed in Nos. 92-7011 and 92-7012 in the Court of Appeals for the D.C. Circuit on January 12, 1993, at pages 4-7, and record there cited.

A. There is no conflict with this Court's decisions.

Petitioners argue that the decision below merits review because it conflicts with opinions in which this Court has stated that the federal courts have the obligation to decide cases in accordance with law. Petition at 12-15. Petitioners' formulation, closely scrutinized, is really no more than an argument that this Court should grant review because Petitioners believe the decision below to have been wrongly decided. Presumably every litigant who disagrees with a ruling could make a similar appeal for certiorari. Yet this Court has focused its review on cases where the decision below is in direct conflict with its prior opinions on the same subject matter or with such decisions by other circuits.

As noted previously, the court of appeals in this case simply respected the trial court's finding of waiver, rejected Petitioners' argument that they were foreclosed from raising the *pro se* defense before judgment, and reviewed the record below only to exercise its discretion to reject the notion that "justice under the circumstances" required reversal.[18] Petitioners have simply cited no opinion of this Court holding that a court of

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[18] Petitioners argue that the Court of Appeals, with its reference to "exceptional circumstances," applied an improper standard to the question of when an issue will be decided on appeal that was not raised below. Petition at 16. Yet in one of the cases Petitioners rely on, *Hormel v. Helvering*, 312 U.S. 552, 557 (1941), this Court reasoned as follows in deciding an issue that had not been raised at the trial level:

> "There may always be *exceptional cases or particular circumstances* which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below.

312 U.S. at 557 (emphasis added).

appeals must reject a trial court finding of waiver, or a trial court's finding that a change of law was not reasonably anticipated, or a discretionary decision to award fees and to deny relief from waiver in the context of a Rule 59(e) motion.

Petitioners rely on *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), but in that case this Court found it significant in exercising its discretion to review an issue that had not been preserved in a timely fashion that *the trial court declined to find a waiver in failure to object timely to a jury instruction* and in fact passed on the very issue presented. The Court carefully commented that the district court's consideration of the issue was not merely as an alternative ground for decision or out of an abundance of caution, 453 U.S. 253-54 & 256 n.11, and took pains to justify its review of an issue which might have been considered waived:

> "Because the District Court reached and fully adjudicated the merits, and the Court of Appeals did not disagree with that adjudication, no interests in fair and effective trial administration . . . would be served if we refused now to reach the merits ourselves."

453 U.S. 256.[19] Here, the district court's comment about Petitioners' failure to present reasons why *Kay v.*

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[19] *See also, Leary v. United States*, 395 U.S. 6 (1969), another case relied on by Petitioners to assert a conflict between the holdings of this Court and the decision below, in which this Court justified upholding a privilege that had not been asserted at the trial level by noting that the court of appeals found no waiver, nor had the party that would have benefitted from a finding of waiver claimed waiver.

The Kattans, of course, argued waiver to both the district court and the court of appeals, and both courts found waiver and declined to reach the merits.

Ehrler, decided under a different statute, should be applied to this EHA case (*see* App. 34a) is at best an alternative ground for decision (*contrast* 453 U.S. at 256, n.11) and more probably simply an expression of frustration at Petitioners' cavalier introduction of the *pro se* issue at the last minute and without any meaningful analysis. And the court of appeals explicitly declined to consider the *pro se* issue. App. 4a. It thus strains the imagination that Petitioners maintain that there is a conflict between the Court of Appeals decision at issue and this Court's decision in the *Newport* case.

Petitioners next suggest a conflict between the decision below and this Court's decision in *Kay v. Ehrler.* Petition at 14-15. Again, Petitioners attempt a sleight of hand. *Kay v. Ehrler* does not concern itself with the bases of the court of appeals decision for which Petitioners seek review, which was the propriety of the district court's finding of waiver and the inappropriateness of the use of Rule 59(e) in particular circumstances. In short, under the reasoning of *Newport,* since the question of whether or not and to what extent *Kay v. Ehrler's* reasoning should apply to this EHA case, had that issue been timely raised, has not been explored by the courts below, the interests of "fair and effective [judicial] administration" will not be served by grant of the writ.

Nor is this Court's recent decision in *Elder v. Holloway,* 62 U.S.L.W. 4149 (February 23, 1994) in conflict with the decision below. There the plaintiff had brought suit alleging violation of his Fourth Amendment rights, but failed to cite an arguably relevant circuit decision which would have been helpful to him to defeat a defense of qualified immunity. The overlooked circuit decision did not inject a new issue or ground of defense into the case, but merely might have supported the position the

plaintiff was taking. This Court reversed the Ninth Circuit, which had decided that it could not take the overlooked decision into account on its review of the trial court's grant of summary judgment against the plaintiff. This Court reversed the Circuit's refusal to consider the impact of the overlooked precedent both because the circuit had erroneously considered the precedent to be a "legal fact" rather than a question of law, and because the circuit's failure to consider all relevant precedent would hinder the purposes of the qualified immunity doctrine.

Neither the court of appeals nor Respondents has taken the position that *if* Petitioners had asserted that *pro se* litigant attorneys were not entitled to attorney fees for their work before judgment, *then* courts on appeal should not be permitted to apply the reasoning of *Kay v. Ehrler* on appeal of the judgment. The whole issue of *pro se* representation was waived by Petitioners here, not simply one authority relevant to that issue.

In addition, in the present case the purposes of the qualified immunity doctrine are not at issue. What is at issue is the power of the trial court to exercise its discretion to award fees and reject untimely arguments that impede the orderly administration of justice when the particular circumstances of a case so require. The court of appeals here has made no erroneous distinctions between law and fact, but has simply upheld discretionary acts of the trial court.

B. There is no conflict with the decisions of other circuits.

Petitioners assert that two circuit decisions are in conflict with the holding below. One of these presents no conflict whatsoever. While the other at first glance

appears to do so, significant factors distinguish it from the ruling that is the subject of this Petition.

In *Weaver v. Bowers,* 657 F.2d 1356 (3rd Cir. 1981), the trial court had held that a defendant had waived a ground of defense to liability by failure to raise that ground before judgment. The Third Circuit agreed that the defense had been waived, and explicitly held that a post-judgment motion to amend did not cure the waiver. The circuit further found that the defendant's reasons for failure to raise the defense were unpersuasive, reasoning as follows:

> ". . . another judge in the district in which this case was pending had considered and filed a reported decision on this very issue. . . . Although that court found [contrary to the defendant's position], it should nonetheless put defendants on notice of the possibility of raising that defense."

657 F.2d at 1361-62. To this point the case is fully in accord with the decision for which review is here sought.

Despite these conclusions, the Third Circuit in *Weaver v. Bowers* went on to exercise its discretion to reach the merits of the waived defense, because it concluded that to do so would vindicate the evenhanded administration of justice. (The court had before it a companion case where the defense at issue had been raised and was outcome determinative, and the court was disinclined to treat the two litigants differently.) The court took care to "limit our decision to the unusual situation at hand" and to emphasize that all litigants were expected to observe the time requirements of the Federal Rules. 657 F.2d at 1362.

The D.C. Circuit panel that ruled on the present case chose to exercise its discretion in the opposite direction.

It had before it a pattern of trial conduct by the Petitioners, and, as far as is known, had before it no other party seeking attorney fees in an EHA case for legal services performed by a parent.

The Eighth Circuit in *Morris v. American National Can Corp.*, 988 F.2d 50 (8th Cir. 1993) permitted a party to invoke an intervening Supreme Court decision to raise a defense to an enhanced attorney fee award in spite of the fact that that party had not argued the theory of the intervening Supreme Court decision prohibiting enhancement in the trial court or on an earlier appeal. Instead, the party seeking the benefit of the change in law had relied on an earlier Supreme Court decision which appeared to permit enhanced fees in the discretion of the court as long as that discretion was exercised within certain guidelines,[20] which earlier decision had already been applied to several cases by the Eighth Circuit. The opinion strongly suggests that the Eighth Circuit was reluctant to hold that a party could waive an issue that the Circuit itself apparently believed had already been decided contrary to that party's position by the Supreme Court. Here, of course, the D.C. Circuit has decided that the defense that attorney fees should not be awarded a *pro se* litigant was a colorable basis for objection which had not been foreclosed by a circuit decision concerning a different statute. Certainly no Court or litigant in the District of Columbia in 1988 had any basis for believing that the question of whether attorney fees were available to *pro se* litigants had already been answered affirmatively by the Supreme Court.

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[20] *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 731-34 (1987) (concurring opinion of Justice O'Connor).

Even if one were to reject this distinction and accept the Eighth Circuit's reasoning in *Morris* as correct, two glaring differences distinguish the situation in *Morris* from our case. First, the Kattans themselves raised the *pro se* issue. Second, as soon as the Supreme Court decision relevant to the *Morris* case was issued, the party seeking to use it brought it to the attention of the appropriate court.[21] In contrast, *Kay v. Ehrler* was issued six months before the judgment of the district court, and Petitioners took no steps to bring that decision to the attention of the district court until after judgment. The district court and the court of appeals were entitled to take these facts into account in making the discretionary decision for which review is sought.

Thus there is no conflict with *Morris* and *Weaver*. All three cases reveal the exercise of sound discretion based on the facts of record. Discretionary decisions by their very nature result in outcomes highly dependent on the factual circumstances involved. This Court should conclude that no conflict exists on the facts of these circuit decisions.

V.

THIS CASE DOES NOT PRESENT ANY SPECIAL OR IMPORTANT REASONS FOR GRANTING REVIEW.

Petitioners suggest (Petition at 10-12, 21-24) that the decision below is one requiring this Court's intervention because, if upheld, it will require counsel routinely to challenge adverse circuit precedent in the hope that this

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[21] The Supreme Court decision came down nineteen days after the trial court's decision awarding enhanced fees, and the defendant promptly appealed to the Eighth Circuit on that basis. 988 F.2d at 51.

Court will overrule that precedent in resolving conflicts between the circuits, that such challenges will give rise to motions for sanctions, and that the trial courts will be clogged.

Even assuming that the judicial burden argument has merit in theory,[22] this is not the case for this Court to use to instruct on the issue, for the decision below can be upheld on very narrow grounds. Here, Petitioners could have seized on the D.C. Circuit's observation that the "law is not clear" on the availability of fees for *pro se* litigants. Here, Petitioners failed to rely on a decision in their favor from the very court in which they were litigating. Here, the Kattans themselves flagged the issue of *pro se* representation and Petitioners failed to take it up. No sanction motion could have been brought against Petitioners because of these three circumstances. Moreover, contrary to Petitioners' fears, other litigants will be unable to make any particular use of the decision below because it is tied so tightly to its facts. The decision below is but one more example of a court of appeals upholding a discretionary decision by a trial court.

The unusual circumstances of this case also suggest that this case is unique and unlikely to recur in a similar

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[22] As noted previously, Petitioners' entire premise is flawed because, as the court below found, existing precedent in the D.C. Circuit did not necessarily control the outcome of a case brought under the EHA and Petitioners were *not* foreclosed from relying on authorities in their favor on the *pro se* issue when opposing the Kattans' fee application in 1988.

In addition, Petitioners' position is put to rest by the fact that for six months after this Court issued *Kay v. Ehrler* – when by no stretch of the imagination could they be said to be foreclosed from raising the *pro se* issue – Petitioners failed to object to the pending fee petition on this basis.

fact pattern again.[23] There are dangers in creating a new rule of waiver based on idiosyncratic facts such as these, due to the difficulty in foreseeing all the future applications of the principles involved in different factual settings.

Important countervening issues of judicial administration suggest that the decision below should stand. Busy trial courts are given certain tools by which they manage their case loads, keep their dockets moving, force counsel to focus on and select the issues they wish to press and make evenhanded decisions. One of the most fundamental of these tools is the doctrine of waiver, which puts parties on notice that if they oppose a position of an adversary party they should set out in their pleading in opposition all grounds on which that opposition rests.[24] The trial courts are, of course, given discretion to lift waivers and reconsider their rulings in the face of new evidence that a party brings in. Such decisions are committed to the sound discretion of trial judges because it is those judges who are in the best position to balance factors relevant to whether failure to raise all relevant matters on a timely basis should be excused, such as a party's good faith attempt to be timely, whether tactical considerations prompted a party's choices, any prejudice to the opposing party, etc. The waiver doctrine is a long-established one in our jurisprudence. It provides comfort to litigants as to the scope of the issues in a case. It permits courts to issue decisions in cases with comfort that judgments cannot be continually reopened.

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[23] It is obvious that the specific issues presented by this case will never recur, for by *Kay v. Ehrler* this Court has surely dissuaded persons seeking attorneys' fees from representing themselves.

[24] *Compare,* Rules 8, 12(g) and (h), and 51, Fed. R. Civ. P.

In the present case, the trial court made the judgment, on the facts and circumstances of this case, that Petitioners had waived the *pro se* issue. She undoubtedly made this decision in light of factors that may not be readily apparent to this Court, such as the conduct and attitude of trial counsel, the fact that Petitioners did not bother to articulate to her why *Kay v. Ehrler* necessarily applied in the EHA context,[25] the conclusory nature and pettiness of other asserted objections to the Kattans' fee application,[26] and whether she believed Petitioners' failure to alert her to *Kay v. Ehrler* before judgment was responsible. She may even have taken into account the fact that, except for her having taken three years to pass on the fee application, this case would have been concluded well before the *Kay v. Ehrler* decision. Our system delegates the weighing of these factors to the one judicial officer in the best position to do so justly.

If this Court were to review this case, it should defer to the trial court's discretionary finding of waiver. If it does so, the taking of this case will not add much to our jurisprudence, for each case involving waiver is by definition limited to its own facts. If it were to take this case and reverse, the Court would be weakening a valuable tool by which trial judges manage their calendars and require the counsel before them to focus on the issues at hand. We respectfully submit that this case should be left to rest on its own facts and on the discretionary rulings of the courts below.

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[25] *See* App. 34a.

[26] *See* App. 29a-30a (especially the reference to Petitioners' objections that "consist of arbitrary, conclusory assertions").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1993

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

SARAH KATTAN, BY HER PARENTS AND NEXT FRIENDS,
SUSAN J. THOMAS AND JOSEPH KATTAN, *et al.*,
Respondents.

Reply to Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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I. *ELDER* REQUIRES REVERSAL HERE.

In *Elder v. Holloway*, 62 U.S.L.W. 4149 (U.S. Feb. 22, 1994), this Court ruled that federal courts have an obligation to decide claims properly before them in accordance with the law. Even in the case of a federal appellate court, questions of law "must be resolved *de novo*," and its inquiry into what the law is must "be conducted in light of all relevant precedents, not simply those cited to or discovered by the district court." *Id.* at 4151, 4150.

In so ruling, this Court explained that the contrary rule that had been adopted by the Ninth Circuit did not advance the legitimate and important interests of either plaintiffs or defendants. In cases like *Elder*, involving questions of law, the Ninth's Circuit rule wrongly results in erroneous decisions "because of shortages in counsels' or the court's legal research or briefing." *Id.* at 4151. This Court also observed:

> The Ninth Circuit's rule could have a number of untoward effects. It could occasion appellate affirmation of incorrect legal results . . . and it could place

> defense counsel in a trying situation. See ABA Model Rule of Professional Conduct 3.3(a)(1989 ed.) ("A lawyer shall not knowingly: . . . (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.").

Id. at 4151 n.3.

Elder requires reversal here. In this case, at the time that the Kattans submitted their fee application in 1988, the parties agreed that *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977), governed the claim of an attorney for fees for any *pro se* representation. Three years later, when Judge Green awarded these fees to Mr. Kattan, none of the parties had brought to her attention, and she apparently had not found, this Court's intervening decision in *Kay v. Ehrler*, 111 S. Ct. 1435 (1991), barring fee awards to *pro se* attorneys under 42 U.S.C. § 1988, a federal fee-shifting statute indistinguishable from the basic fee provision here. Because under *Elder*, an appellate court is required to decide a legal claim properly before it *de novo* in light of all relevant precedents, Judge Green was required to decide the validity of Mr. Kattan's claim for attorney's fees for his *pro se* representation in light of the obviously relevant *Kay v. Ehrler*. When she failed to do so, the District acted properly in bringing *Kay v. Ehrler* to her attention in a motion under Fed. R. Civ. P. 59(e), a motion which destroyed the finality of her judgment.

The reasons for the rule set forth in *Elder* apply with equal force here. First, the waiver rule announced by the D.C. Circuit, in which legal rights are settled based on the authority cited by the parties in the district court in the first instance, does not advance the legitimate and important interests of any of the litigants. Second, as even the Opposition appears to concede (Opp. 22 n.23), the D.C. Circuit's waiver rule has resulted in "appellate affirmation of [an] incorrect legal result[] . . .." *Elder*, *supra*, 62 U.S.L.W. at 4151 n.3. Finally, the ethical considerations cited by this Court in *Elder* are

relevant here. Model Rule 3.3(a) would have required counsel for the Kattans to bring *Kay v. Ehrler* to Judge Green's attention had they known of the decision.

II. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW.

The Opposition argues that the District has misstated the issue in this case and that the issue actually presented is of no importance. The Opposition is wrong on both counts.

One way of fairly stating the issue here is whether the lower federal courts must decide claims properly before them "in light of all relevant precedents, not simply those cited to" them. *Elder*, *supra*, 62 U.S.L.W. at 4150. It is the District's position that when Judge Green entered her order awarding fees in 1991, some three years after the fee application had been briefed, she was obligated to decide Mr. Kattan's claim for fees as a *pro se* attorney in light of *Kay v. Ehrler*, an obviously relevant precedent from this Court. The D.C. Circuit, however, rejected this position. As *Elder* demonstrates, whether the D.C. Circuit erred presents an important legal issue.

Another way of fairly stating the issue here is whether a litigant forfeits his right to have his case decided in accordance with a relevant rule of law announced by this Court because a contrary rule of law, which had been adopted as the law of the Circuit, reasonably appeared to govern the case prior to this Court's decision. Once again, given this Court's numerous decisions reversing the law of the Circuits, this issue is an important legal issue.

Review is warranted here not only because this Petition presents an important legal issue but also because the waiver standard adopted by the D.C. Circuit is in conflict with the decisions of this Court and of other Circuits. The Opposition's attempts to distinguish a few of the decisions the District cited in its Petition are patently unsuccessful for several reasons, including the following. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), for example, can-

not be distinguished on the ground that the district court there "in fact passed on the very issue presented" while Judge Green "declined to reach the merits." Opp. 15 & 15 n.19. Here, Judge Green did reach the merits and she wrongly ruled that *Kay v. Ehrler* was not controlling (App. 33a-34a), a ruling that the D.C. Circuit left intact. Furthermore, the Opposition's attempt to distinguish *Morris v. American National Can Corp.*, 988 F.2d 50 (8th Cir. 1993), also fails. No reasonable lawyer or federal court judge could have believed that *Delaware Valley II* (*Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987)), would be this Court's last pronouncement on the issue of risk enhancement, and the Eighth Circuit excused a waiver of the issue in *Morris* because it had adopted, as the law of the Circuit, Justice O'Connor's opinion in *Delaware Valley II*.

III. THE OTHER ARGUMENTS IN THE OPPOSITION THAT THIS CASE DOES NOT MERIT REVIEW DO NOT WITHSTAND ANALYSIS.

A. This Court Need Not Decide Whether *Kay v. Ehrler* Bars The *Pro Se* Fee Award Here.

The Opposition argues that this Court should deny review because review will require this Court to decide whether *Kay v. Ehrler* bars the *pro se* fee award here. This argument is plainly mistaken. This Court, as it did in *Elder*, can decide only the waiver issue and, should the Court decide that issue in favor of the District, it can remand to the D.C. Circuit with instructions to determine whether *Kay v. Ehrler* is controlling.

B. This Case Does Not Present Any Complex Factual Questions.

The Opposition urges that this Court should deny review because this case, in a number of ways, presents complex factual questions. This argument, in all of its manifestations, is unfounded.

First, given *Elder*, this Court could rule that Judge Green was obligated to decide Mr. Kattan's claim for fees as a

pro se attorney in light of *Kay v. Ehrler* whether or not the District's understanding of *Cuneo* was reasonable. However, should the Court decide that a more stringent waiver standard is needed here, one which, for example, depends on whether an attorney reasonably could have concluded that *Cuneo* was controlling, this Court is free to announce what the standard should be and remand to the D.C. Circuit for further proceedings.

Alternatively, this Court could itself decide whether the District's position was reasonable. On the record here, this issue is an issue of law. Furthermore, the record here makes clear that the District's understanding of *Cuneo* was reasonable. Thus, less than three weeks before the divided decision in this case, the D.C. Circuit in *Benavides v. Bureau of Prisons*, 993 F.2d 257 (D.C. Cir.), *cert. denied*, 114 S. Ct. 559 (1993), ruled that the only distinction the District could have made between *Cuneo* and this case was "untenable" and thus indefensible. *Id.* at 259. In addition, at the district court level, the Kattans cited only *Cuneo* in support of their argument that the law required an award of attorney's fees to successful *pro se* attorneys. In taking this approach, they obviously expressed their belief that a reasonable reading of *Cuneo* required a fee award to an attorney for any *pro se* representation under the IDEA. They should therefore be estopped from arguing later, for tactical reasons, that the District's agreement with their earlier position was unreasonable. Finally, the Opposition concedes that, following *Kay v. Ehrler*, no reasonable attorney proceeding *pro se*, including Mr. Kattan, would seek fees in a case like this one, even though the D.C. Circuit has not expressly overruled *Cuneo*.[1]

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[1] The Opposition (Opp. 4, 8, 9, 10, 21) also suggests that the District should be faulted because the court in *Cuneo* stated "[t]he law is not clear on the question of whether a party appearing on his own behalf, who is also an attorney, is entitled to tax attorney fees as costs." 553 F.2d at 1366. This suggestion is ridiculous. The court made this statement in surveying the law of other jurisdictions construing a number of fee-shifting statutes; the court then went on to adopt as the law of the D.C. Circuit the rule that such fees are recoverable. After *Cuneo*, therefore, the law of the D.C. Circuit was clear — attorneys proceeding *pro se* under federal fee-shifting statutes may recover fees.

C. This Case Does Not Involve Any Discretionary Balancing Of The Equities.

The Opposition urges that review should be denied because, although the courts below did not say so, what is at issue here is a judgment based on the "facts and circumstances of this case, . . . such as the conduct and attitude of trial counsel" for the District. Opp. 23. See also Opp. 3, 3 n.4, 4, 12, 13. According to the Opposition, the D.C. Circuit found a waiver of the *pro se* fee claim because, *inter alia*, the District "had tenaciously attempted to defend an untenable position" in litigating the merits of the action. Opp. 12.

This argument is utterly mistaken for several reasons.

First, it overlooks the reasons given by the D.C. Circuit for its waiver ruling. The D.C. Circuit ruled that the District could not invoke *Kay v. Ehrler* because it failed to dispute *Cuneo* by pressing a distinction between the FOIA and the IDEA that "would have been far from frivolous." App. 5a. See also App. 7a-8a. That ruling is a pure legal ruling, not a balancing of any equities, and, if wrong, is an abuse of discretion. *See, e.g., Fogerty v. Fantasy*, Inc., 62 U.S.L.W. 4153 (U.S. March 1, 1994) (the standards governing the exercise of discretion in awarding attorney's fees are questions of law); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law . . ..").

Second, it overlooks the fact that the courts below expressly rejected the arguments the Opposition urges they secretly embraced. Thus, the Kattans' request for sanctions at the trial level was denied (App. 31a), and when they asked for a larger fee award on appeal for trial misconduct, that was also denied. App. 10a. Furthermore, the District persuaded Judge Green that both Mr. Kattan and his co-counsel were requesting hourly rates that were too high. App. 27a-29a. When the Kattans appealed the hourly rate Judge Green had adopted for co-counsel, the D.C. Circuit affirmed

that rate. App. 8a-9a. Finally, despite arguments by the Kattans, neither Judge Green nor the D.C. Circuit faulted the District for its delay in bringing *Kay v. Ehrler* to Judge Green's attention.[2]

In a similar fashion, the Opposition argues that Judge Green may have found a waiver in order to compensate the Kattans for her three-year delay in acting on the fee application, during which time this Court resolved the *pro se* fee issue against them. Opp. 23. This argument, however, far from being a reason for denying review, is a reason for granting review. A federal court cannot refuse to follow the law on the grounds that had it acted more promptly, the other side would have won based on an incorrect legal principle.

Finally, despite the Opposition's recitation that a court may exercise discretion in determining whether a matter has been waived by considering "whether tactical considerations prompted a party's choices, any prejudice to the opposing party, etc.," no such discretion was exercised here. Opp. 22. Had such discretion been exercised, it is plain that neither the District's acceptance of *Cuneo* in 1988 nor its failure to raise *Kay v. Ehrler* before judgment was prompted by any tactical consideration. Furthermore, it is equally plain that the Kattans were not prejudiced by the District's failure to dispute *Cuneo* or by its delay in bringing *Kay v. Ehrler* to Judge Green's attention. In short, there was no exercise of discretion in the traditional sense in this case. Instead, the courts below failed to understand and apply the law governing waiver.

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[2] In view of the facts of *Elder*, where plaintiff's trial counsel overlooked a Circuit precedent that existed even before his suit was filed, the courts below properly refused to fault the District for its six-month delay in bringing *Kay v. Ehrler* to Judge Green's attention, especially since the fee application had been pending before her for over two years when this Court issued *Kay v. Ehrler*.

IV. THE D.C. CIRCUIT'S WAIVER RULE DOES NOT ADVANCE THE FAIR AND EFFICIENT ADMINISTRATION OF JUSTICE.

The Opposition, citing Fed. R. Civ. P. 8, 12(g) & (h), and 51, urges that waiver plays an important role in "judicial administration." Opp. 22. In the District's view, however, and as *Elder* and the cases cited in its Petition make clear, waiver is disfavored in the federal judicial system even though it does have a proper role to play in certain circumstances. Here, of course, the rules cited in the Opposition do not apply to this case. Second, the reasons for these rules and for judge-made rules of waiver do not apply here. A waiver may properly be found when necessary to advance the fair and efficient administration of justice. For example, a waiver may be found to preclude "sandbagging" — a tactic in which a litigant awaits the outcome of a case and, if it is adverse, raises a defense that could, and should, have been raised earlier and that eviscerates all or part of the proceedings that have taken place.

This obviously is not what happened here. The District did not seek, and could not hope to gain, any tactical advantage by its conduct. Furthermore, the Kattans were not prejudiced and the administration of justice was not adversely affected by the District's failure to dispute *Cuneo* or by its delay in invoking *Kay v. Ehrler*.

Finally, whatever contribution the waiver doctrine may make to the fair and efficient administration of justice must, in the context of this case, be weighed against the important contribution that the law of the Circuit makes in achieving that goal. In this case, the District's acceptance of *Cuneo* as controlling in 1988 advanced the fair and efficient administration of justice. The District, by not advancing a distinction that the D.C. Circuit ultimately found untenable when squarely placed before it, avoided launching what surely would have been a losing battle over the validity of the district court's opinion in *Lawrence v. Staats*, 586 F. Supp. 1375 (D.D.C. 1984), in light of the controlling the law of the Circuit in *Cuneo*. And the District likely also avoided

precipitating another collateral battle over sanctions. The Kattans did, in fact, file a motion for sanctions because, in their view, the District "tenaciously attempted to defend an untenable position" on the merits, and there is no reason to believe that they would not have filed another motion for sanctions had the District "tenaciously attempted to defend an untenable position" on the *pro se* fee issue in 1988.

CONCLUSION

This petition presents an issue that recurs with great frequency and that should be resolved by this Court to ensure the fair and efficient administration of justice. At the very least, this Court should order the D.C. Circuit to reconsider its decision in light of *Elder*.

Respectfully submitted,

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